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MacKinnon on Marx on Marriage and Morals: An Otsogistic Odyssey¹

MARC LINDER*

[Love, not . . . for the proletariat, but rather love for the sweetheart and in particular for you, makes the man into a man again.

Karl Marx (age 38) to Jenny Marx (age 42) (his wife of thirteen years)²

I. MACKINNON ON MARX

A. *Say It Ain't So, Challey*³

Karl Marx was an MCP. Viewing the world through the distorting mirror of his hatred for his mother, he looked down on women in general.⁴ Even on the eve of his fiftieth birthday, five years after his mother's death, he was still mercilessly deriding her failure to have mastered spoken or written High German.⁵ At the same time—1868 was apparently a good year for misogyny—when he was at the height of his intellectual powers, without the excuse of youth or

1. "[O]tsog": "a close-knit narrative that pays its respects to scholarship and dues to pedantry; also an exceedingly diversified (and thoroughly parenthesized*) piece of scholarship." ROBERT MERTON, *ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT* 275 (1965) ("*and heavily footnoted").

* © Marc Linder. Associate Professor of Law, University of Iowa. Like some sort of intellectual Sam Carr (or his black lab), Gail Hollander "made me do it." Criticisms by Pat Cain, John Houghton, Herb Hovenkamp, Julius Sensat, and Larry Zacharias prompted revisions incorporated in this Article.

2. Letter from Karl Marx to Jenny Marx (June 21, 1856), in 3:8 KARL MARX [&] FRIEDRICH ENGELS, *GESAMTAUSGABE* (MEGA) 30-31 (1990).

3. One of Marx's family nicknames; Eleanor Marx-Aveling, *Karl Marx: Lose Blätter*, in MOHR UND GENERAL: *ERINNERUNGEN AN MARX UND ENGELS* 242, 244-45 (1982 [1895]) [hereinafter MOHR UND GENERAL].

4. ARNOLD KÜNZLI, *KARL MARX: EINE PSYCHOGRAPHIE* 305, 309 (1966); LEWIS FEUER, *The Character and Thought of Karl Marx: The Promethean Complex and Historical Materialism*, in MARX AND THE INTELLECTUALS: A SET OF POST-IDEOLOGICAL ESSAYS 9, 34-39 (1969 [1968]) (jejune psychobabbings).

5. "Wenn die Karell Kapital gemacht hätte, statt etc.!" Letter from Karl Marx to Friedrich Engels (Apr. 30, 1868), in 32 MARX [&] ENGELS, *WERKE* [MEW] 75 (1965) ("If Karl had made capital instead etc.!" [of writing *Kapital*]). For examples of Henriette Marx's difficulties with German, see her postscripts to the letters from her husband Heinrich (and her own after his death) to their son when he was a university student (Nov. 18-29, 1835, Mar. 1836, Sept. 16, 1837, Feb. 2, 1838, Feb. 15-16, 1838, Oct. 22, 1838, May 29, 1840), in 3:1 MARX [&] ENGELS, *GESAMTAUSGABE* (MEGA) 292, 294-95, 320, 329, 330, 334, 347 (1975).

senility, he stooped to the following banal humor: "Societal progress can be measured exactly by the societal position of the beautiful sex (the ugly ones included)."⁶ A self-proclaimed aficionado of obscure smutty poetry in several languages,⁷ he was also a prude⁸—a combination of traits suggesting a disturbed relation to women.⁹ The kind of role model he inculcated in his daughters can be gauged by his responses to their requests for parlor-game "confessions": he listed "weakness" as his favorite virtue in women (and, of course, "strength" in men).¹⁰

Throughout his adult life he expressed contempt for women by standing Maurice Chevalier on his head—no great feat after he had done it to Hegel—and thanking "hayven for leetle" boys:¹¹ in 1851 and again in 1855 he complained to Engels that his wife had given

6. Letter from Marx to Ludwig Kugelmann (Dec. 12, 1868), in 32 MEW, *supra* note 5, at 583. To be sure, Marx was making a joke, as emerges from the rest of the letter in which he praised the National Labor Union in the United States for treating female workers with complete parity. A week earlier Marx, after asking Kugelmann whether his wife was active in the "great German ladies emancipation movement," expressed the conviction that German women needed to "begin to impel their men towards self-emancipation." Letter from Marx to Kugelmann (Dec. 5, 1868), in *id.* at 581. When Kugelmann introduced Marx to his wife and daughter, Marx cut off Kugelmann's political conversation by saying it was not for "young ladies." Franziska Kugelmann, *Kleine Züge zu dem großen Charakterbild von Karl Marx*, in MOHR UND GENERAL, *supra* note 3, at 252-53. Ironically, Marx ended his friendship with Kugelmann over the latter's browbeating of his wife. Letter from Marx to Engels (Sept. 18, 1874), in 33 MEW 116-17 (1966).

7. Letters from Marx to Engels (Oct. 19 and Nov. 7, 1867), in 31 MEW 368-69, 380 (1965) (relating story of sturdy fellow whom nuns in Russian nunnery had "ridden to death" in twenty-four hours).

8. In his late forties he told the young man courting one of his daughters in no uncertain terms that in his opinion the true love of one in love expressed itself in reserve, modesty, and even shyness vis-à-vis his idol. Letter from Karl Marx to Paul Lafargue (Aug. 13, 1866), in 31 MEW, *supra* note 7, at 519. Recounting his sea voyage to Hamburg to read the proofs of *Das Kapital*, Marx explained why one female passenger—"old nag with toothless maw"—had caroused with him and other men instead of joining the other women "vomiting in the ladies cabin": "this beauty" was charmed by an account of "sexual obscenities of the savages" in Peru who roasted the afterbirth and served it as "sweetbread" to visitors. Letter from Marx to Engels (Apr. 13, 1867), in *id.* at 288.

9. KÜNZLI, *supra* note 4, at 300-01.

10. 31 MEW, *supra* note 7 (illustration opposite 596). For some insight into the psyches of these politically involved independent thinkers and their relationships to their "extremely loving father," see THE DAUGHTERS OF KARL MARX: FAMILY CORRESPONDENCE 1866-1898 (1982). YVONNE KAPP, ELEANOR MARX 27 (1972). Even a hostile critic concedes that Marx was "[a]n exemplary father." RALPH BUULTJENS, THE SECRET OF KARL MARX: HISTORY, PSYCHOLOGY AND MARXISM 60 (1985) [hereinafter THE SECRET OF KARL MARX]; see also Ralph Buultjens, *What Marx Hid*, N.Y. TIMES, Mar. 14, 1983, at A15.

11. "Vivat der kleine Weltbürger! Il faut peupler le monde de garçons d'autant plus que la statistique anglaise montre un excès de filles." Letter from Marx to Jenny Longuet (Aug. 19, 1879), in 34 MEW 388 (1966) (congratulating her on the birth of his grandson Edgar).

birth to a girl and not to a boy;¹² thirty years later, on hearing that his oldest daughter had given birth to a boy, he informed her that he preferred the birth of boys at "this turning point of history" because they had "the most revolutionary period before them. . . ."¹³

Fearing the loss of Engels' friendship because he had insensitively asked for a loan instead of consoling Engels when the latter's wife died, Marx blamed his own wife's eccentric excitability—using the occasion to pontificate about women as "funny creatures" accustomed to demanding the impossible.¹⁴ He expressed appreciation for a lifetime of devotion from his wife, who sacrificed a goodly portion of her energy copying his illegibly written manuscripts for submission to publishers (the "happiest [days] of her life"),¹⁵ by concluding from her inability to keep within her household budget—the constraints of which were largely a result of his failure ever to have done an honest day's work in his life¹⁶—that women were constantly in need of a guardianship.¹⁷ And even when he complimented his wife, Marx was really tooting his own proprietary horn. Writing to his wife from their hometown, Trier, where he was busy collecting his inheritance from his recently deceased mother, Marx boasted that every day people asked him about the "quondam 'most beautiful girl of Trier' and the 'queen of the ball.' It is damn pleasant for a

12. Letter from Marx to Engels (Apr. 2, 1851), in 27 MEW 229 (1965); Letter from Marx to Engels (Jan. 17, 1855), in 28 MEW 423 (1963).

13. Letter from Marx to Jenny Longuet (Apr. 29, 1881), in 35 MEW 186 (1967).

14. Letter from Marx to Engels (Jan. 28, 1863), in 30 MEW 319 (1964). An East German hagiography of Marx agrees with Marx's criticism of his wife. LUISE DORNEMANN, JENNY MARX, DER LEBENSWEG EINER SOZIALISTIN 190-92 (1982 [1968]).

15. KAPP, *supra* note 10, at 40; Jenny Marx, *Kurze Umriss eines bewegten Lebens*, in MOHR UND GENERAL, *supra* note 3, at 186, 203. Her work as his amanuensis was literally the fruition of a longstanding fantasy. When the twenty-one year-old Marx was courting Jenny Westphalen, she wrote him a letter explaining that since his last letter she had imagined that he might have gotten into a dispute and a duel; night and day she saw him wounded and bleeding, which vision, she confided, had not made her completely unhappy because she also almost imagined that he had lost his little right hand; this thought in turn made her blissful because she thought she could become indispensable to him and "then you would always have me around you and keep loving me. Then I thought that I would have been able to write down all your dear heavenly thoughts and become rather useful to you." Letter from Jenny von Westphalen to Karl Marx (ca. 1839-1840), in 3:1 MARX [&] ENGELS, GESAMTAUSGABE (MEGA), *supra* note 5, at 338.

16. "I could put an end to the matter tomorrow if I wanted to run a practical business tomorrow instead of working for the cause." Letter from Karl Marx to Ludwig Kugelmann (Oct. 9, 1866), in 31 MEW, *supra* note 7, at 529. A few years earlier he had asserted that his effort to secure a job in a railway office had been thwarted by his illegible handwriting. Letter from Marx to Kugelmann (Dec. 28, 1862), in 30 MEW, *supra* note 14, at 640. Marx conceded his dereliction in warning Paul Lafargue, who was about to marry his daughter Laura, not to ruin her life financially as Marx had his wife's. Letter from Marx to Lafargue (Aug. 13, 1866), in 31 MEW, *supra* note 7, at 518-19.

17. Letter from Marx to Engels (July 22, 1869), in 32 MEW, *supra* note 5, at 343-44.

man when his wife lives on in the fantasy of a whole city as 'enchanted princess.'¹⁸ To add crowning injury to insult, at a particularly trying time in his wife's life, when she was off in Holland begging his relatives for money to keep the family afloat, instead of beginning his study of the history of economics, this self-professed "strong-joined paterfamilias,"¹⁹ not the type to frequent a bordello,²⁰ apparently found nothing better to do than father a child with their faithful servant, whom his mother-in-law had sent to them as a present; Engels then obliged him once again by taking the rap.²¹

B. MacKinnon's Disembedded Deconstruction of Marx

So far the score is Catharine MacKinnon 100, Carl²² Marx 0—and MacKinnon has not even begun to play. Precisely because her feminist critique of Marxism never even mentions Marx's alleged conventionally patriarchal personal views and treatment of women,²³ her charge that Marx's social theory failed to rise above

18. Letter from Marx to Jenny Marx (Dec. 15, 1863), in 30 MEW, *supra* note 14, at 643. Yet even Buultjens concedes that "[w]ith his wife . . . Marx sustained a deep and loving relationship." BUULTJENS, *THE SECRET OF KARL MARX*, *supra* note 10, at 58.

19. Letter from Marx to Engels (Feb. 3, 1851), in 27 MEW, *supra* note 12, at 173.

20. In addition, in what medium could the immiserated Marx have paid? Perhaps he could have paid in natura by reading from his unpublished works highlighting the situationally most relevant passages such as: "Like the woman from marriage into general prostitution, the whole world of wealth . . . steps out of the relationship of exclusive marriage with the private owner into the relationship of universal prostitution with the community." Karl Marx, *Ökonomisch-philosophische Manuskripte aus dem Jahre 1844*, in MEW, Supp. pt. 1, at 465, 534 (1968).

21. KÜNZLI, *supra* note 4, at 325-35; KAPP, *supra* note 10, at 289-97. Ironically, Jenny Marx's loving letter to Marx telling him of her travails confided to him that: "I know how you and Lehnchen [their servant, Helene Demuth] will take care of them [the children]. Without Lehnchen I'd have no peace of mind here. She has it much too hard . . ." Letter from Jenny Marx to Karl Marx (Aug. 1850), in 3:3 MARX [&] ENGELS, *GESAMTAUSGABE* (MEGA) 622 (1981). The sole source of the story of Marx's paternity is a typewritten copy, partly corrected in pencil, of unknown origin, of an alleged letter from 1898 from Louise Freyberger-Kautsky to August Bebel. That Marx may not have been the father after all has been argued by HEINZ MONZ, *KARL MARX: GRUNDLAGEN DER ENTWICKLUNG ZU LEBEN UND WERK* 359-61 (1973); FRITZ RADDATZ, *KARL MARX: EINE POLITISCHE BIOGRAPHIE* 205-11 (1975); TERRELL CARVER, *FRIEDRICH ENGELS: HIS LIFE AND THOUGHT* 161-71 (1989). BUULTJENS, *THE SECRET OF KARL MARX*, *supra* note 10, at 69-71; HEINZ F. PETERS, *RED JENNY: A LIFE WITH KARL MARX* 104-05 (1986), fabricate dramatizations without stating that they are fictitious.

22. MONZ, *supra* note 21, at illustration 10 opposite 208 (spelling on Marx's birth certificate).

23. After the failure of the revolutions of 1848, when Marx argued that the proletariat might have fifty years of struggle ahead of it, he and his wife—together with many other refugees—abandoned their "vie de bohème" and withdrew into the "life of the bourgeois-honest philistine," if for no other reason than to create an "orderly, respectable bourgeois life" or at least a semblance thereof for their daughters. Karl Marx, *Sitzung der Zentralbehörde vom 15. September 1850*, in 8 MEW 597, 598 (1960); Jenny Marx, *Kurze*

the prejudice of his era "that women naturally belong where they are socially placed" gains in plausibility.²⁴

MacKinnon goes on to argue that whereas for Marx, sex, as situated in the natural "material substratum," . . . was not subject to social analysis," by "[a]pplying a marxist methodological critique to feminist theory and practice, a feminist approach to consciousness is identified which locates sexuality as central to women's social condition."²⁵ Yet MacKinnon herself concedes that her feminist critique of Marx "may seem . . . groping and comparatively primitive."²⁶ Her methodology underscores the disembodied character of her critique:

This chapter does not address the ways in which Marx's theories of social life are, are not, or can be made applicable to women's experience or useful for women's liberation. It addresses what Marx and Engels said about women, women's status, and women's conditions. This book treats the work of Marx as a whole, rather than dividing him into "old" and "young," but with the understanding that his work, like that of most people, did develop and change over time.²⁷

This failure to contextualize is irreconcilable with and undermines MacKinnon's attempt to deconstruct Marx.²⁸ Instead, her holistic approach turns out to be nothing but an undifferentiated collection of quotations from the radically different periods of Marx's development.²⁹ Although MacKinnon's dominance theory as a whole has been faulted for its ahistorical and essentialist character,³⁰ an enthusiastic reviewer's intimation that she is the feminist Marx³¹ might have nurtured the belief that at least her understanding of Marx had not succumbed to ahistoricism. But MacKinnon's quick-

Umriss eines bewegten Lebens in MOHR UND GENERAL, *supra* note 3, at 193, 200-01; Letter from Marx to Kugelmann (Mar. 6, 1868), in 32 MEW, *supra* note 5, at 539.

24. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 13 (1989). For a feminist critique of Marx based on a solid understanding of *Das Kapital*, see CHRISTEL NEUSÜß, DIE KOPFGEBURTEN DER ARBEITERBEWEGUNG ODER DIE GENOSSIN LUXEMBURG BRINGT ALLES DURCHEINANDER (1985).

25. MACKINNON, *supra* note 24; Catharine MacKinnon, Feminism, Marxism, Method and the State ii (1987) (Ph.D. dissertation, Yale University) (Abstract) (no pagination).

26. MACKINNON, *supra* note 24, at x.

27. *Id.* at 255 n.1.

28. For more scholarly deconstruction of the early Marx from a socialist-feminist perspective, see JAMES WINDERS, GENDER, THEORY, AND THE CANON 48-71 (1991).

29. For a contextualized and critical overview of the evolution of Marx's views, see Hal Draper, *Marx and Engels on Women's Liberation*, in FEMALE LIBERATION: HISTORY AND CURRENT POLITICS 83-107 (Roberta Salper ed., 1972).

30. Angela Harris, *Categorical Discourse and Dominance Theory*, 5 BERKELEY WOMEN'S L.J. 181, 189 (1989-90); Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1138 n.6 (1990).

31. See Frances Olsen, *Feminist Theory in Grand Style*, 89 COLUM. L. REV. 1147, 1167-69 (1989).

and-dirty Marx-autopsy is particularly outmoded since serious feminist scholarship has stressed that Marx's analysis of gender relations can be understood only by observing both the strict distinction between his historical-empirical and conceptual-categorical statements and the caesura in his work with regard to women, which mark off changes in his conceptual apparatus and the systematic construction of his theories.³² For her ahistorical polemic MacKinnon's only justification is presumably that it is adequate to its subject since: "Whatever one can say about Marx's treatment of women, his first failing and best defense are that the problems of women concerned him only in passing."³³

The analysis here begins with MacKinnon's critique of Marx's discussion of women (underground coal mine) workers in *Capital* and then moves to an examination of the role of paternalism in labor-protective legislation (§ I.C). Then, using as a point of transition MacKinnon's gratuitous throwaway remark about Marx's alleged veneration of monogamy (§ II.A), which unwittingly brought to light a little-known chapter at the beginning of Marx's political career, this Article shifts the focus away from MacKinnon and toward nineteenth-century Prussian marriage and divorce law. It begins by disintering the context of Marx's statement in the twenty-four year-old's political diatribe against the founder of German legal positivism, Gustav Hugo. After introducing Hugo (§ II.B), the Article discloses the context of Marx's attack—the debate about Prussian divorce law reform in the 1840s (§ II.C). In order to appreciate the cultural understandings that informed that controversy, it is also necessary to explore the attitudes and theories of classical German idealist philosophy about women and marriage (§ II.D). There follows a critical analysis of Marx's gonzo-journalistic assault on Hugo as a stand-in for the Minister of Justice and head of the Historical School of Law, Friedrich Carl von Savigny, whom the king had commissioned to rechristianize the Prussian law of divorce (§ II.E). The discussion of Marx's own major but little-known journalistic contribution to the debate on marriage and divorce in 1842 emphasizes the interpretive difficulties presented by texts that were subject to strict government censorship and threatened censorship (§ II.F). If, in the end, the young Marx's views of marriage lagged behind his contemporaneous analysis of the roots of rural poverty, it turns out to be for reasons other than those MacKinnon has articulated (§ II.G).

32. See, e.g., URSULA BEER, GESCHLECHT, STRUKTUR, GESCHICHTE: SOZIALE KONSTITUIERUNG DER GESCHLECHTERVERHÄLTNISSE 48-49 (1991 [1989]).

33. MACKINNON, *supra* note 24, at 19.

C. *Anti-Paternalistic Championing of Nineteenth-Century Women Miners*

[T]he worker's motives, desires, pride, cruelties, consciousness, will, historical existence are absorbed into the system of production. The concreteness of his presence there is registered by the immediacy of his presence in *Capital*. . . . So, too, the most intimate extension of personhood, the family, continually enters bodily into the text; for like all other attributes of the worker, his or her children and spouse are present in the factory, field, or mine. . . .³⁴

Even when discussing direct capitalist exploitation of female wage laborers, MacKinnon charges that Marx inevitably turned "a problem of exploitation" into "a problem of morality"—"When men work, they become workers, Marx's human beings. When women work, they remain wives and mothers, inadequate ones"—a view Marx shared with "contemporary 'pro-family' conservatives."³⁵

Although he usually abjures moral critique as a bourgeois fetish, Marx displays moral sensitivities on women's work. Abhorring the "moral degradation caused by capitalistic exploitation of women and children," Marx observes: "Before the labour of women and children under 10 years of age was forbidden in mines, capitalists considered employment of naked women and girls, often in company with men, so far sanctioned by their moral code, and especially by their ledgers, that it was only after the passing of the Act that they had recourse to machinery." It is unclear how nudity is profitable. When men are exploited, it is a problem of exploitation; when women are exploited, it is a problem of morality.³⁶

What Marx in fact wrote was that "capital found the method of using up [vernutzen] naked women and girls, often bound together [zusammengebunden] with men, in coal and other mines" in accordance with its morals and ledger.³⁷ Going even further, in the French edition of *Capital* Marx inserted at the end of the sentence quoted by MacKinnon the sarcastic phrase: "and suppressed these capitalist marriages."³⁸ Only in some sort of MacKinnonite Lake Wobegon—where all the men were above-average male chauvinist pigs but all the women were even stronger—would Marx have

34. ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 266 (1987 [1985]).

35. MACKINNON, *supra* note 24, at 17, 256 n.10.

36. *Id.* (quoting 1 MARX, *CAPITAL* 399, 393-94 (1967)).

37. 1 KARL MARX, *DAS KAPITAL: KRITIK DER POLITISCHEN ÖKONOMIE* (2d ed. 1872), in II:6 MARX [&] ENGELS, *GESAMTAUSGABE* (MEGA) 383 (1987). The second edition was the last published during Marx's life.

38. 1 KARL MARX, *LE CAPITAL*, in II:7 MARX [&] ENGELS, *GESAMTAUSGABE* (MEGA) 336 (1989 [1872-75]). Marx stated that the French edition "possède une valeur scientifique indépendante." *Id.* at 690.

shown his true sexist colors presumably by failing to express his horror at the possibility of women's sexually abusing or raping the men by taking advantage of the involuntarily close and inescapable contact.³⁹ In the real world, a thirty-seven year-old human "beast[] of burthen,"⁴⁰ Betty Harris, testified: "I have a belt round my waist, and a chain passes between my legs, and I go on my hands and feet." Her situation was exacerbated when she was pregnant or when her miner-husband, for whom she pulled coal, beat her for not being ready on time.⁴¹ No wonder that after Parliament prohibited female labor underground in 1842, "[t]hose who supported the pit brow lasses, even the most ardent of nineteenth-century suffragists, deplored women's work in coal mines and did not urge its resumption."⁴²

But beneath the heavy-handed sarcasm MacKinnon's indictment of Marx is not that he chauvinistically saw women as weak where they were really strong, but rather that for him: "Women are more exploitable than men, not just more exploited, their character a cause rather than a result of their material condition." Consequently Marx did not understand "that working-class women are specially exploited by capital—and with proper support and organization might be able to hold out for higher wages, better conditions, and fight mechanization...."⁴³ Presumably MacKinnon

39. On apparently nonconsensual sexual intercourse in the mines, see CHILDREN'S EMPLOYMENT COMMISSION, FIRST REPORT OF THE COMMISSIONERS 32-33 (15 Parl. Pap. 1842); MICHAEL POLLARD, *THE HARDEST WORK UNDER HEAVEN: THE LIFE AND DEATH OF THE BRITISH COAL MINER* 59-60, 71 (1984). Even Jane Humphries, "...*The Most Free From Objection...*" *The Sexual Division of Labor and Women's Work in Nineteenth-Century England*, 47 J. ECON. HIST. 929, 938-40 (1987), who emphasizes the "cant-filled discussion of morality," concedes that women in the mines "were most at risk" to sexually "abusive treatment" where they worked "outside the family system."

40. MICHAEL FLINN, *1700-1830: The Industrial Revolution*, in 2 THE HISTORY OF THE BRITISH COAL INDUSTRY 335 (1984) (quoting the Ninth Earl of Dundonald, himself a mine owner, in 1793).

41. CHILDREN'S EMPLOYMENT COMMISSION, APPENDIX TO FIRST REPORT OF COMMISSIONERS (MINES), pt. II at 230-31 (18 Parl. Pap. 1842). For woodcuts showing women at this work, see *id.* at 31, 61, 165.

42. ANGELA JOHN, *BY THE SWEAT OF THEIR BROW: WOMEN WORKERS AT VICTORIAN COAL MINES* 52 (1980). On the background of the statute, see Alan Heesom, *The Coal Mines Act of 1842, Social Reform, and Social Control*, 24 HIST. J. 69 (1981). On the more inspiring experiences of twentieth-century female underground coal miners in the United States, see Marat Moore, *Hard Labor: Voices of Women from the Appalachian Coalfields*, 2 YALE J.L. & FEMINISM 199 (1990).

43. MACKINNON, *supra* note 24, at 18. Despite this charge, MacKinnon does refrain from accusing Marx of having supported the bourgeois political-cultural campaign to ban employment of women in underground mines in order "to organise pit village women as a means of educating pit village men in the lessons of morality and order." ROBERT COLLS, *THE PITMEN OF THE NORTHERN COALFIELD: WORK, CULTURE, AND PROTEST, 1790-1850*, at 133-34 (1987). What Marx (and Engels) in fact shared with their contemporaries was the

means "with proper support" from men. Yet even feminist analysis has argued that under the labor market conditions of the nineteenth century, proletarianization of additional family members such as wives in overstocked trades was futile and did not increase total family wages.⁴⁴

In ridiculing Marx, MacKinnon refers to a passage in *Capital* in which Marx cited at great length the evidence furnished to a parliamentary committee inquiry on mines by male miners on the employment of women:⁴⁵

Marx's only comment in his own voice is that the apparent concern of the questioners for these women is a cloak for their financial self-interest. . . . Actually, what the male miners say supports women's exclusion from this work—a viewpoint inconsistent with the motive of material interest Marx attributes to them. . . . One can only conclude that Marx is able to understand the concern of the bourgeois questioner as inimical to his own, so attributes it to material interest even when it conflicts with material interest.⁴⁶

By conflating the bourgeois questioners' material interest with that

empirical overestimation of the extent of married women's participation in the wage labor force; "their programmatic response to the situation, to their eternal credit, placed them squarely at odds with conservatives and with most of the labour movement as well." Wally Secombe, *Patriarchy Stabilized: The Construction of the Male Breadwinner Wage Norm in Nineteenth-Century Britain*, 11 SOC. HIST. 53, 69 n.11 (1986). Without taking a position on the issue, Marx criticized the ambiguity of a socialist party program demand for limitation of women's work on the ground that it could be interpreted as calling for the exclusion of women from industries that were harmful to the "female body" or "immoral [sittenwidrig] for the female sex." Marx added inconclusively that if the authors meant the latter, they should have said so. Karl Marx, *Randglossen zum Programm der deutschen Arbeiterpartei*, in 19 MEW 15, 31 (1962 [1875]).

44. Jane Humphries, *Class Struggle and the Persistence of the Working-Class Family*, 1 CAMBRIDGE J. ECON. 241, 252-53 (1977). Humphries concedes that: "The tragedy is that action could not be controlled on a class basis, but had to be regulated systematically on the basis of female labour, and theoretically of married female labour, so reinforcing sex-based relations of dominance and subordination." *Id.* at 253. Nevertheless, she argues, male workers did not necessarily gain at the expense of women workers and family wages rose when women were banned from underground work. Even John Stuart Mill, the greatest nineteenth-century philosophical advocate of gender equality, shared this belief. GAIL TULLOCH, *MILL AND SEXUAL EQUALITY* 29 (1989).

45. MacKinnon incorrectly characterizes the report as "on the employment of women as colliers in mines." MACKINNON, *supra* note 24, at 256 n.17. Although a small part of the testimony was devoted to women, the charge went to the operation of acts for the regulation and inspection of the mines, with the bulk of the evidence focused on accidents and safety. REPORT FROM THE SELECT COMM. ON MINES iii (12 Parl. Pap. 1865, C. 398). Moreover, as Marx noted in the passage she cites, Parliament had prohibited the employment of women in underground mines twenty-four years before the report. See generally, IVY PINCHBECK, *WOMEN WORKERS AND THE INDUSTRIAL REVOLUTION* 240-70 (1930); JOHN, *supra* note 42.

46. MACKINNON, *supra* note 24, at 256 n.17.

expressed in the testimony of the male miners, to whom Marx attributed no motives whatsoever, MacKinnon's argument does not even rise to the level of incoherence: she is simply (undialectically) confused.

Marx's interstitial comment was that after all the information that they elicited about the moral condition of women, finally the "secret" of the bourgeois questioners' "sympathy" for widows and poor families emerged: women were being paid wages only half those of men.⁴⁷ In later testimony, which Marx did not cite, General Francis Dunne, an M.P. on the committee,⁴⁸ had the following colloquy with a collier: "And the object of employing women is to make it cheaper to the proprietor?—Yes, I believe it is."⁴⁹ Several other witnesses testified to the same effect, adding that no man would work for such wages.⁵⁰ The sympathy to which Marx was alluding was directed at the exclusion of women from mining. Thus the unnamed interrogator who elicited the testimony Marx quoted turns out to have been Henry Fawcett, a professor of political economy at Cambridge, who enjoyed little professional esteem in Marx's eyes.⁵¹ In his very popular contemporary economics textbook Fawcett adopted a position that should be congenial to MacKinnon, opposing all state regulation of adults' employment conditions.⁵² This view was congruent with the testimony of a mine inspector, who objected to state interference with anyone's decision to earn his or her bread by labor.⁵³

Marx's imputation of material interest to the questioners and/or the employers did not at all conflict with their material interest—in women's miserably low wages. Thus instead of this passage's being yet another instance of Marx's obsession blocking his view of women as workers, MacKinnon's confused interpretation illustrates her own obsession: "[T]he exclusion of women from these jobs . . . is in the material interest of male workers, converging with a denial of material self-interest by the bourgeois employer through an affirmation of his sexism."⁵⁴

In fact, mine owners by and large had not even contested the

47. MARX, *supra* note 37, at 472-73 n. 321. On wages, see 2 JOHN NEF, *THE RISE OF THE BRITISH COAL INDUSTRY* 167-68, 189 (1932) (women often paid nothing for helping their husbands).

48. DOD'S PARLIAMENTARY COMPANION 181 (33d Year, 1865).

49. REPORT FROM THE SELECT COMM. ON MINES, *supra* note 45, Q. 2999 at 87.

50. *Id.*, QQ. 2323-26 at 68, QQ. 6837-38 at 206, QQ. 7410-12 at 229, Q. 7423 at 230.

51. See, e.g., 1 KARL MARX, *DAS KAPITAL*, in 23 MEW 638-39 (1962 [1867]).

52. HENRY FAWCETT, *MANUAL OF POLITICAL ECONOMY* 225-31, 600-01 (7th ed. 1888 [1863]).

53. REPORT FROM THE SELECT COMM. ON MINES, *supra* note 45, Q. 7344 at 226 (testimony of Joseph Dickinson).

54. MACKINNON, *supra* note 24, at 256 n.17.

statutory prohibition of female underground employment a quarter-century earlier in 1842⁵⁵ "because the women in the mines were employed and paid by the miners and not by the owners."⁵⁶ Because the male miners controlled the women, who were often their wives, daughters, or sisters, and their wages, and did not compete with them for the same jobs, feminist scholars who have struggled with the sources have articulated the paradox that male miners sought to abolish a system that operated in their favor and to replace it with one that increased their hours and work.⁵⁷ Conversely, owners of larger and more capital-intensive mines favored exclusion of women both because it impeded operation of smaller mines that relied on female labor and promoted the rationalization of capitalist management by eliminating adult males as inside contractors who supervised their female relatives and instating formal and real subsumption of all workers under capital.⁵⁸

MacKinnon's hatchet job on Marx, which is executed with all the textual and historical sensitivity of someone who has picked up a translation—and not even the most accurate one at that⁵⁹—of *Capital*, hunted down references to women, and spontaneously reacted to them from her own particular perspective, leaves no trace of the fact that because underground women workers "found themselves at the centre of a deep-rooted and complex controversy . . . the debate about their right to work must be viewed both in the light of the shocking conditions to which women and girls had been subjected underground and also in the context of the problems posed by

55. An Act to Prohibit the Employment of Women and Girls in Mines and Collieries, 1842, 5 & 6 Vict., ch. 99, § 1 (Eng.)

56. J. L. HAMMOND & BARBARA HAMMOND, LORD SHAFTESBURY 80 (1939 [1923]).

57. See Jane Humphries, *Protective Legislation, the Capitalist State, and Working Class Men: The Case of the 1842 Mines Regulation Act*, FEMINIST REV., Spring 1981, at 1, 15-16; Angela V. John, Letter to Editor, FEMINIST REV., Autumn 1981, at 106, 107; Jane Mark-Lawson & Anne Witz, *From "Family Labour" to "Family Wage"? The Case of Women's Labour in Nineteenth-Century Coalmining*, 13 SOC. HIST. 151, 161-62, 172-73 (1988) (in coalmining areas where family labor prevailed, male hewers may not have initially favored excluding women, perhaps because of concomitant capitalist subordination, but may have done so later); HARRIET BRADLEY, MEN'S WORK, WOMEN'S WORK: A SOCIOLOGICAL HISTORY OF THE SEXUAL DIVISION OF LABOUR IN EMPLOYMENT 110-11 (1989). See also A. J. Heesom, *The Northern Coal-Owners and the Opposition to the Coal Mines Act of 1842*, 25 INT'L REV. SOC. HIST. 236, 236-40 (1980) (some male miners may have opposed exclusion of women for material reasons). For contemporary evidence that at least some miners opposed exclusion, see 65 PARL. DEB., H.L. (3d ser.) 119 (1842) (remarks of Londonderry). A year after passage of the Act, one M.P. spoke of the desirability of a male's earning a wage sufficient to support his family. 69 PARL. DEB., H.C. (3d ser.) 444 (1843) (remarks of Hume).

58. Mark-Lawson & Witz, *supra* note 57, at 165-68.

59. The best English translation is 1 KARL MARX, CAPITAL (Ben Fowkes trans., 1976).

their enforced exclusion from this work in the 1840s."⁶⁰ Had MacKinnon attended to this political context in which Marx as a very political animal found himself,⁶¹ perhaps she would have wondered herself whether prohibiting women from the "unbelievably hard and damaging to the health"⁶² work of carrying 120 pounds of coal on their backs "climbing up steep, winding staircases . . . [a]rmed with a short stick and a candle held between their teeth . . . for eight or ten hours without a rest"⁶³ as mere helpers to fathers, husbands, and brothers was a sexist measure or one towards which the male miners held "complex and . . . contradictory" attitudes.⁶⁴

Marx's focus on women's extraordinarily low wages was of a piece with his general awareness of the peculiar capitalist exploitation of women and of its relationship to their peculiar exploitability. As an example of how even in developed capitalist societies the redundancy of labor brought about by the introduction of machinery in certain industries could so depress wages below the value of labor power that its use was not profitable in others, Marx noted that even in his day women in England were occasionally still used instead of horses for pulling in the construction of canals "because the labor required for the production of horses and machines [is] a mathematically given quantum, whereas that for the maintenance of women of the surplus population is beneath all calculation."⁶⁵

MacKinnon charges that in Marx's discussion of the appropriation of female labor made possible by the adoption of machinery, "[t]his theorist . . . could see the work women do in the home only as free labor, when the only sense in which it is free is that it is unpaid."⁶⁶ Apart from the fact that Marx stepped out of his role as

60. JOHN, *supra* note 42, at 60.

61. In the midst of correcting the galley proofs of the first volume of *Capital*, Marx expressed his outrage over capitalists' lobbying to hobble legislation that would have put an end to "torture" for non-adult male workers and explained that he would combat the move through the International. Letter from Marx to Engels (June 22, 1867), in 31 MEW, *supra* note 7, at 305-06. Even as principled a critic of Marx as Popper certified that "his burning protest against these crimes, which were then tolerated, and sometimes even defended, not only by professional economists but also by churchmen, will secure him forever a place among the liberators of mankind." 2 K. R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 122 (1973 [1945]). Since the aforementioned letter to Engels also contains Marx's ardent hope "that the bourgeoisie will think of my carbuncles its whole life," perhaps his outburst had more material than ideal origins.

62. FLINN, 1700-1830: THE INDUSTRIAL REVOLUTION, *supra* note 40, at 335.

63. JOHN, *supra* note 42, at 22. See also THOMAS ASHTON & JOSEPH SYKES, *THE COAL INDUSTRY OF THE EIGHTEENTH CENTURY* 24-25 (1929).

64. JOHN, *supra* note 42, at 40, 32.

65. MARX, *supra* note 37, at 383.

66. MACKINNON, *supra* note 24, at 16. MacKinnon's sarcasm reaches its highpoint when she speculates that Marx's major criticism of capital's usurpation of women's formerly "free labor" in the household was that "dinner was not ready on time." *Id.* She fails

"theorist" and into that of popularizer and propagandist in inserting much of the empirical-historical material into the first volume of *Capital*,⁶⁷ his discussion is a tad more sophisticated than MacKinnon gives him credit for. In analyzing this subjection of women to "forced labor for the capitalist" "under the immediate subordination of capital," Marx recognized that the value of labor power was determined not only by the labor time required to maintain the individual adult worker, but also that of the worker's family. Where mechanization "throws" the whole family on to the labor market, it spreads the value of the man's labor power over the whole family and thus devalues it: by being able to buy the labor power of four workers, the capitalist may have to pay more than for that of the head of the family, but he appropriates much more surplus labor in proportion to the wages.⁶⁸ Moreover, Marx emphasized that women's reproductive labor was not "free." Since "certain functions of the family" such as taking care of children "cannot be completely suppressed, the mothers of the families who are confiscated by capital must more or less hire replacements. . . . The reduced expenditure for domestic labor corresponds therefore to increased expenditure of money. The costs of production of the worker family therefore grow and balance the increased income."⁶⁹

to note the ironic overlay of Marx's comments on this subject. He referred to a report on the condition of workers in cotton manufacturing districts in England, who were unemployed as a result of the American Civil War, that detailed how working women finally had the necessary leisure to breast feed their children instead of poisoning (that is, pacifying) them with opiates and to learn to cook. Marx's commented laconically: "Unfortunately this art of cooking fell in a moment when they had nothing to eat." MARX, *supra* note 37, at 384 n.120. In her dissertation, MacKinnon actually quotes this passage without seeing the irony. MacKinnon, *supra* note 25, at 31-32.

67. See TONY SMITH, *THE LOGIC OF MARX'S CAPITAL: REPLIES TO HEGELIAN CRITICISMS* 124-37 (1990).

68. MARX, *supra* note 37, at 384-85; 18 JÜRGEN KUCZYNSKI, *DIE GESCHICHTE DER LAGE DER ARBEITER UNTER DEM KAPITALISMUS: STUDIEN ZUR GESCHICHTE DER LAGE DER ARBEITERIN IN DEUTSCHLAND VON 1700 BIS ZUR GEGENWART* 88-90, 98-100 (1963). But see Michèle Barrett & Mary McIntosh, *The "Family Wage": Some Problems for Socialists and Feminists*, *CAPITAL & CLASS*, Summer 1980, at 51, 64:

Marx implies that the level of the male wage did previously reflect the costs of subsistence of the labourer's wife and her substitutes. This, however, seems open to doubt. The existence of wage differentials from the earliest period of the transition to capitalism and apparently relating to minimum subsistence needs of men and women, suggests that the wage has never . . . been determined as a family wage. And if it never had been a "family wage" reflecting a family-based calculation of costs of reproduction, it is inappropriate to argue that the employment of women and children would necessarily lower the value of labour power.

69. 1 MARX, *supra* note 37, at 385 n.121. In fact, wives who perform wage labor spend fewer hours on housework than non-wage working wives but face even longer total work weeks. See Heidi Hartmann, *The Family as the Locus of Gender, Class, and Political*

Contrary to MacKinnon's claim that Marx one-sidedly viewed women from a moral perspective,⁷⁰ he also persistently moralized about the fact that the social system had turned both fathers and mothers into slave traders of their children as workers just as he demanded mandatory limits on working hours "not only against manufacturers, but also against the workers themselves".⁷¹ "It is not, however, the abuse of parental power which created the direct or indirect exploitation of immature workers by capital, but rather it is on the contrary the capitalist mode of exploitation which has made parental power, through abolition of the economic basis corresponding to it, into an abuse."⁷² Moreover, MacKinnon's claim that Marx confused the cause and effect, the form and content of women's exploitation under capitalism is irreconcilable with her acknowledgment that Marx found it self-explanatory that, under postcapitalist conditions, the cooperative labor of women and men outside the household would become "the source of humane development."⁷³ Her further assertion that for Marx "[t]he woman who works outside the home is a class enemy by nature"⁷⁴ verges on the grotesque given Marx's insistence on the emancipatory function of women's participation in socially organized production and his progressive role in

Struggle: The Example of Housework, 6 SIGNS 366, 377-86 (1981).

70. She suggests that what most bothered Marx about women's wage labor was that rather than selling their own labor power, their husbands sold them. MACKINNON, *supra* note 24, at 16. Here MacKinnon overlooks the self-reinforcing relationship among the economic base, the legal superstructure, and consciousness. In Germany, for example, husbands were, as late as 1957, entitled to terminate their wives' employment contracts without notice; until 1977, wives were entitled to work outside the home only insofar as such employment was compatible with their marital and familial duties. BGB §§ 1356, 1358.

71. Letter from Marx to Ludwig Kugelmann (17 Mar. 1868), in 32 MEW, *supra* note 5, at 540, 541; MARX, *supra* note 37, at 385, 467.

72. MARX, *supra* note 37, at 468. By the same token, Marx actually advocated the industrial employment of children of both sexes starting at the age of nine—subject to strict regulation of hours and safety conditions—in connection with school as "one of the most powerful means of transforming today's society." Karl Marx, *Randglossen zum Programm der deutschen Arbeiterpartei*, in 19 MEW, *supra* note 43, at 32; Karl Marx, *Instruktionen für die Delegierten des Provisorischen Zentralrats zu den einzelnen Fragen*, in 16 MEW 190, 193-94 (1962 [1866]) [hereinafter *Instruktionen*].

73. MACKINNON, *supra* note 24, at 19. MacKinnon misquotes the passage from Marx, which reads "humane" not "human." MARX, *supra* note 37, at 468.

74. MACKINNON, *supra* note 24, at 18. In the undiluted conspiratorial version, this charge ran as follows: "Marx . . . favored protective labor legislation to shield women from the worst ravages of industrial exploitation so that they would be better able to perform their domestic labors. Socialists . . . have supported protective labor legislation for women. The effect of socialist chivalry is to keep women from being able to compete for jobs on the same terms as men. . . . Consequently . . . men are also assured an adequate supply of reproductive and carnal servants." ANDREA DWORKIN, *Sexual Economics: The Terrible Truth*, in LETTERS FROM A WAR ZONE: WRITINGS 1976-1987, at 117, 121 (1988 [1976]).

educating the German Social Democrats as to the need for equal treatment of women workers.⁷⁵

MacKinnon returns to these themes in a more modern context by criticizing labor-protective laws for women as having "demeaned all women ideologically" while they "contributed to keeping some women from competing with men at the male standard of exploitation. This benefited both male workers and capitalists. . . . They were a victory against capitalism and for sexism." Whereas such legislation was "paternalistic," "[p]rotecting all workers was not considered demeaning by anyone."⁷⁶ Curiously, MacKinnon ignores the so-called social feminist movement of the 1920s, which pushed for minimum wage laws for women by means of an industrial equality-through-difference strategy. These feminists eschewed the epithet "paternalism," instead viewing different treatment as empowering women to achieve equality.⁷⁷ Here gender politics make strange bedfellows as MacKinnon finds herself aligned with perhaps the most reactionary justice of the U.S. Supreme Court ever to rule on such laws.⁷⁸ In his dissent from the case that triggered MacKinnon's

75. For the fruits, see AUGUST BEBEL, *DIE FRAU UND DER SOZIALISMUS* (1973 [1879]). See generally MECHTHILD MERFELD, *DIE EMANZIPATION DER FRAU IN DER SOZIALISTISCHEN THEORIE UND PRAXIS* 52 (1972); WERNER THÖNNESSEN, *FRAUENEMANZIPATION: POLITIK UND LITERATUR IN DER DEUTSCHEN SOZIALDEMOKRATIE ZUR FRAUBEWEGUNG 1863-1933*, at 11-27 (1969). By way of contrast, even after World War I an eminent German economic historian bemoaned the economic emancipation of the working-class housewife because it meant that both spouses lost their autonomy when she too came under "the yoke of the enterprise." KARL BÜCHER, *BEITRÄGE ZUR WIRTSCHAFTSGESCHICHTE* 296-99 (1922).

76. MACKINNON, *supra* note 25, at 165-66. For a different view, see Angela Coyle, *The Protection Racket?* FEMINIST REV., No. 4, 1980, at 1; THEDA SKOCPOL, *PROTECTING WOMEN AND SOLDIERS: THE ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 379-80 (1992). Even Hartmann, who believes that patriarchal male workers have driven gender segmentation more than capitalists and expresses *Schadenfreude* when capitalists use low-paid women against men, concedes that the question of the motives of various groups vis-à-vis exclusionary protective legislation on behalf of women is "thorny." Heidi Hartmann, *Capitalism, Patriarchy, & Job Segregation by Sex*, 1 SIGNS 137, 166-68, 154 n.43 (Supp. 1976). For a feminist critique of MacKinnon's undifferentiated denunciation of protective legislation as "male," see *Female Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 68 (1985) (contribution by Ellen DuBois). For an empirically nuanced analysis of the impact of such laws on women's position in the labor market that is at variance with MacKinnon's claims, see Claudia Goldin, *Maximum Hours Legislation and Female Employment: A Reassessment*, 96 J. POL. ECON. 189 (1988); Jeremy Atack & Fred Bateman, *Whom Did Protective Legislation Protect? Evidence from 1880*, in NATIONAL BUREAU OF ECONOMIC RESEARCH, *WORKING PAPER SERIES ON HISTORICAL FACTORS IN LONG RUN GROWTH* (No. 33, 1991).

77. Sybil Lipshultz, *Social Feminism and Legal Discourse, 1908-1923*, in *AT THE BOUNDARIES OF THE LAW: FEMINISM AND LEGAL THEORY* 209 (Martha Fineman & Nancy Thomadsen eds., 1991 [1989]). On the resurgence of this result-equality (as opposed to rule-equality) model as a feminist strategy, see MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 3-52 (1991).

78. Women's rights campaigns have historically been marked by "peculiar alliances"

attack, Justice Sutherland remarked, in one of his typical denunciations:

Difference of sex affords no reasonable ground for making a restriction applicable to the wage contracts of all working women from which like contracts of all working men are left free. Certainly a suggestion that the bargaining ability of the average woman is not equal to that of the average man would lack substance. The ability to make a fair bargain, as everyone knows, does not depend upon sex.⁷⁹

Earlier he had written for the Court in striking down a minimum wage law for women and children that:

[W]e cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men. . . . To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special consideration or be subjected to special restraint in her contractual and civil relationships.⁸⁰

Contrary to MacKinnon's claim that no one deemed universal protection demeaning—which is most clearly refuted by the opposition to social security old-age pensions—reactionaries like Sutherland could plausibly regard protective legislation for workers in general as a form of impermissible class legislation only in the same way in which abstract advocacy of freedom of contract constructs protective legislation for women workers as sex discrimination because it interferes with women's "equal right to starve."⁸¹ MacKinnon therefore exposes herself to Frances Olsen's

in the United States. In the 1940s, 1950s, and 1960s, for example, southern racists and anti-labor conservative Republicans supported the ERA and the inclusion of sex discrimination in Title VII. CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968, at 9-38, 176-81 (1989 [1988]).

79. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 413 (1937).

80. *Adkins v. Children's Hosp.*, 261 U.S. 525, 553 (1923). Yet the next year Sutherland upheld a New York law prohibiting the night-time employment of women in restaurants on the ground that "there would seem to be good reason for . . . thinking" that women's "more delicate organism" would cause them to suffer the harmful consequences of the "loss of a restful night's sleep" more than men. *Radice v. New York*, 264 U.S. 292, 294 (1924). For an effort to reconcile these seemingly inconsistent positions, see Lipshultz, *supra* note 77, at 219-25. See generally Joan Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905-1923*, J. AM. HIST. 188 (1991).

81. Lipshultz, *supra* note 77, at 224. See generally Hal Draper & Anne Lipow, *Marxist Women and Bourgeois Feminism*, in *THE SOCIALIST REG.* 1976, at 179, 185 (Ralph Miliband & John Saville eds., 1976). The argument in the text presupposes that the special legislation for women in fact addresses a special female need; as an example, the Japanese Labor Standards Law provides for menstruation leave for women. Roodoo

critique of disembodied antipaternalists, whose pretense of "an equality between people that does not actually exist . . . may facilitate continuation of actual inequality—for example, by encouraging an unrealistic faith in freedom of contract."⁸² MacKinnon's position, which is homologous to contemporary arguments against a mandatory minimum wage or special protection for migrant farm workers,⁸³ overlaps with that of nineteenth-century free-marketeers who "regard[ed] the liberty to compete for employment upon unfavorable terms as a valuable right,"⁸⁴ state interference with which they deemed emasculatory—"an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States."⁸⁵

At precisely the same time that courts in the United States were launching this anti-paternalistic attack, Engels articulated this socialist position on protective legislation for female workers:

That the working woman needs special protection against capitalist exploitation as a consequence of her special physiological functions, seems clear to me. The English female champions of the formal right of women to be as thoroughly exploited by the capitalists as men are also largely directly or indirectly interested in the capitalist exploitation of both sexes. I concede that I am interested in the health of the coming generation more than the absolute formal equal entitlement of the sexes during the last years of life of the capitalist mode of production. A real equal entitlement of man and woman can according to my conviction come true only when the [on the basis of male domination developed capitalist] exploitation of both by capital is eliminated and private housework is transformed into a public industry.⁸⁶

jooken hoo, Law No. 49 of 1947, art. 67. Feminist opponents of special protective legislation before the New Deal did in fact approve of the freedom of contract reasoning. SUSAN LEHRER, *ORIGINS OF PROTECTIVE LABOR LEGISLATION FOR WOMEN, 1905-1925*, at 72-75 (1987).

82. Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518, 1522 (1986). See also Raymond Muntz & David C. Rice, *Women Workers: Protection or Equality?*, 24 INDUS. & LAB. REL. REV. 3, 11-12 (1970).

83. See generally MARC LINDER, *MIGRANT WORKERS AND MINIMUM WAGES: REGULATING THE EXPLOITATION OF AGRICULTURAL LABOR IN THE UNITED STATES* 65-123 (1992).

84. ERNST FREUND, *STANDARDS OF AMERICAN LEGISLATION* 124 (2d. ed. 1965 [1917]). See also SIDNEY FINE, *LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT 1865-1901*, at 159-62 (1969 [1956]).

85. *Godcharles v. Wigeman*, 6 A. 354, 356 (Pa. 1886). For further examples of judicial resistance to a "system of state paternalism" treating workers as wards of the government despite the fact that "[i]t is our boast that no class distinctions exist in this country," see *State v. Loomis*, 22 S.W. 350, 353 (Mo. 1893); *Kansas v. Haun*, 59 P. 340, 345, 346 (Kan. 1893).

86. The passage reads in the original:

This issue has once again become the focus of intense debate in connection with employers' so-called fetal vulnerability policies resulting in the quasi-blanket exclusion of women from certain jobs exposing workers to hazardous substances. The U.S. Supreme Court recently ruled that neither employers nor the courts but only the woman herself has the right to make "[d]ecisions about the welfare of future children" or to "decide whether a woman's reproductive role is more important to her and her family than her economic role."⁸⁷ If scientific evidence proved that exposure of women to airborne lead concentrations does harm fetuses, Engels might have disagreed with this opinion to the extent that it appears to privilege women's autonomy absolutely.⁸⁸ Instead, he might well have agreed that although conferring on capitalist employers the sole right to make these kinds of decisions would have been even worse, the Supreme Court's opinion "revealed . . . the impoverishment of the language of individual rights and the inadequacy of liberal feminism to insure the health and security of both women and men."⁸⁹ Both he and Marx did advocate enforcement by the state of compulsory labor standards against the shortsightedness and ignorance of individual workers of both sexes—provided that the excluded workers were not required to bear the costs one-sidedly.⁹⁰

Daß die arbeitende Frau infolge ihrer besondern physiologischen Funktionen besondern Schutz gegen kapitalistische Ausbeutung bedarf, scheint mir klar. Die englischen Vorkämpferinnen des formellen Rechts der Frauen, sich ebenso gründlich von den Kapitalisten ausbeuten zu lassen wie die Männer, sind auch größtenteils direkt oder indirekt bei der kapitalistischen Ausbeutung beider Geschlechter interessiert. Mich, ich gestehe es, interessiert die Gesundheit der kommenden Generation mehr als die absolute formelle Gleichberechtigung der Geschlechter während der letzten Lebensjahre der kapitalistischen Produktionsweise. Eine wirkliche Gleichberechtigung von Frau und Mann kann nach meiner Überzeugung erst eine Wahrheit werden, wenn die [auf Basis der Männerherrschaft entwickelte Kapital] Ausbeutung beider durch das Kapital beseitigt und die private Hausarbeit in eine öffentliche Industrie verwandelt ist.

Draft of letter from Friedrich Engels to Gertrud Guillaume-Schack (ca. July 5, 1885), in 36 MEW 341 (1967) (phrase in square brackets crossed out in draft).

87. *UAW v. Johnson Controls, Inc.*, 111 S.Ct. 1196, 1207, 1210 (1991).

88. The logic of this anarcho-liberal position also characterizes the argument that a woman's right to submit to exposing herself (and her fetus) to dangerous substances at her place of employment is justified because autonomy-enhancement also drives the decision to allow women to smoke and drink during pregnancy. Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1242 (1986).

89. Ruth Rosen, *What Feminist Victory in the Court?*, N.Y. TIMES, Apr. 1, 1991, at A17 (nat. ed.). For undocumented assertion to the contrary, see SALLY KENNEY, *FOR WHOSE PROTECTION? REPRODUCTIVE HAZARDS AND EXCLUSIONARY POLICIES IN THE UNITED STATES AND BRITAIN* 332 (1992) ("Because feminists did not seek equal rights for men and women to poison their offspring, but sought equal access to a workplace free from hazards . . .").

90. See Karl Marx, *Instruktionen*, *supra* note 72, at 194; Becker, *supra* note 88, at

II. MARX ON MARRIAGE AND MORALS

A. *The Immature Marx on Monogamy*

After disposing of Marx as an economic analyst, MacKinnon remarks that although Marx saw a "progressive potential" in the spread of female wage labor, the mixing of the sexes at the workplace under capitalism was for him "a pestiferous source of corruption and slavery."⁹¹ Immediately after this quotation from *Capital* MacKinnon states that:

Sex in marriage was another thing, however: 'the sanctification of the sexual instinct through exclusivity, the checking of instinct by laws, the moral beauty which makes nature's commandment idea in the form of an emotional bond—[this is] the spiritual essence of marriage.'⁹²

When and where did Marx make this claim? Uninterested in context, MacKinnon does not say. In providing a source, she misspells two of the three words of the title: "Chapitre de [sic] marriage [sic]." What is this racy-sounding French-language tract? MacKinnon offers no precise source because she does even not purport to have read it; instead, she quotes the passage (inaccurately) from a book reprint of a journal article by Juliet Mitchell.⁹³ Mitchell in turn had cited a French edition of some of Marx's works without any further details as to when it was written or where it had appeared or what it was.⁹⁴

So what was this *Chapter on Marriage*? The introduction to that French edition, which appeared in 1946, shed some light on the question. The *Chapitre du mariage*, it turns out, was part of an article, *Manifeste philosophique de l'école de droit historique*, which Marx had written in German in 1842 for publication in a newspaper; this particular part was deleted by the censors; the manuscript including the unpublished segment was discovered by a professor J.

1268. In his appellate dissent, Richard Posner overlooked these aspects in assuming that an employer operates a factory in a "civilized, humane, prudent, ethical" manner where it exposes workers to levels of airborne lead injurious to workers in nonreproductive ways. *UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 906 (7th Cir. 1989), *rev'd*, 111 S.Ct. 1196 (1991).

91. MacKinnon, *supra* note 24, at 18-19 (quoting 1 MARX, CAPITAL at 489-90, 377).

92. *Id.* at 19.

93. *Id.* at 257 n. 19: ("Karl Marx, 'Chapitre de mariage,' quoted in Juliet Mitchell, 'Women: The Longest revolution,' in *From Feminism to Liberation*, ed. Edith Hishino Altbach (London: Schenkman, 1971) p. 107 n.9"). In fact the quote is not in a footnote but at 107. Mitchell's translation does not use the word "idea" but "ideal." The quote first appeared in Mitchell's article in NEW LEFT REVIEW, No. 40, Nov.-Dec. 1966, at 11, 22.

94. 1 KARL MARX, OEUVRES COMPLÈTES, ED. MOLITOR OEUVRES PHILOSOPHIQUES 25. Juliet Mitchell, *supra* note 94. Although Mitchell does not state the year of this publication, she too appears to have cited the wrong page.

Hansen. The reason that Mitchell referred to it as *Chapitre* was presumably that it appeared only in the introduction of the French translation although its proper placement in the article was indicated.⁹⁵ The French translation of the passage that Mitchell (and after her MacKinnon) quoted ran as follows:

la sanctification de l'instinct sexuel par l'exclusivité, le refrènement de l'instinct par les lois, la beauté morale qui idéalise le commandement de la nature en motif de liaison spirituelle—l'essence spirituelle du mariage. . . .⁹⁶

Although the French edition did not explain what the *Chapitre du mariage* was a chapter from, it did offer a German source for the text and background material. *Chapitre* (that is, *Kapitel von der Ehe*) was not published until 1927 when it appeared in the first volume of the first projected critical-historical complete edition of the works of Marx and Engels.⁹⁷ The editor, Ryazanov, noted that Professor Joseph Hansen had succeeded in the 1920s in locating the original manuscript in Cologne including the section deleted by the censors, which he had made available to Ryazanov.⁹⁸ In fact, Ryazanov never saw the manuscript because the "owner" of the manuscript did not permit Hansen, who was the director of the Historical Archive of Cologne, to make a copy of it; instead, Hansen prepared a copy by hand. Because the manuscript has never surfaced,⁹⁹ no one other than Hansen has ever been able to vouch for the authenticity, let alone the existence, of the *Chapter*.

Assuming arguendo that Marx was in fact the author of the *Chapter on Marriage* in the article that he later treated as an orphan,¹⁰⁰ what was it a chapter of? It turns out that "Chapter" referred not to a chapter of a book by Marx, but to one in someone else's book.¹⁰¹ That other author was Gustav Hugo. How it came to

95. 1 KARL MARX, OEUVRES PHILOSOPHIQUES x-xi (J. Molitor trans., 1946) (introduction written by Bracke (A.M. Desrousseaux)). As a result of a typographical error, the year of publication of Marx's article is given as "1942."

96. *Id.* at xi.

97. 1:1 pt. 1 KARL MARX [&] FRIEDRICH ENGELS, HISTORISCH-KRITISCHE GESAMTAUSGABE 255-57 (David Ryazanov ed., 1927). [hereinafter MEHG]

98. *Id.* at xlix. It is unclear how the editors of Marx's works know that the censors rather than Marx deleted these passages; the deletion was not visible in the newspaper. RHEINISCHE ZEITUNG, No. 221, Aug. 9, 1842, Supp., at 1, col. 2. In an otherwise thorough account, A. McGovern, *Karl Marx's First Political Writings: The Rheinische Zeitung 1842-1843*, in DEMYTHOLOGIZING MARXISM 19, 30 (Frederick Adelman ed., 1969), is unaware that the section on divorce was deleted before publication.

99. 1:1 MARX [&] ENGELS, GESAMTAUSGABE (MEGA) 1017 (1975) (apparatus volume).

100. See *infra* § II.E.

101. In fact, not even in that book were the sections on marriage grouped as a "chapter."

pass that Marx began his journalistic career¹⁰² with a biting commentary on a turn-of-the-century university law textbook has not been adequately appreciated in the literature on German law or Marx.

B. *Gustav Hugo—The First Legal Trasher?*

Hugo, whom his most illustrious student, the young Heinrich Heine, praised for being so boring that his two-hour lectures improved the poet-law student's health by scaring off all mental exertion,¹⁰³ was a professor of law at Göttingen for more than a half-century—from the time of the French Revolution until his death in 1844.¹⁰⁴ Hugo has recently been called "the single most important Romanist lawyer of the decade [the 1790s], and one of the most important lawyers in Germany for decades after."¹⁰⁵ Another historian of ideas has hailed "Hugo's . . . pioneering efforts [for having] established the direction of nineteenth-century German legal thought."¹⁰⁶ Despite such influence, however, Hugo's major work on jurisprudence, his *Textbook on Natural Law*, which Marx attacked in 1842, was, according to a conservative contemporary, not adopted at other universities because—and here Hugo may have been a precursor of

102. Even a hostile biographer attested that "[i]t is one of Marx's minor titles to fame that he was the first noteworthy German journalist." EDWARD CARR, *KARL MARX: A STUDY IN FANATICISM* 118 (1938 [1934]). Ironically, even a Stalinist hagiography failed to accord Marx this honor. KARL BITTEL, *MARX AS JOURNALIST* (1953).

103. "[M]it H. Heines Gesundheit bessert es sich erstaunlich! Und dies verdanke ich dem ledernen, schweinsledernen, doppelschweinsledernen Ritter Hugo, der von meinen [sic] Kopfe täglich 2 Stunden alle Geistesanstrengungen verscheucht." Letter from Heinrich Heine to Rudolf Christiani (Feb. 29, 1824), in 20 HEINRICH HEINE, *SÄKULARAUSGABE: BRIEFE 1815-1831* 146 (1970). The next year, after Hugo, as dean of the law faculty, in conferring a degree on Heine had compared his poetry to Goethe's, Heine defended him against the contemptuous remarks of the Hegelian Eduard Gans (under whom Marx later studied the Prussian General Code), calling "Hugo . . . one of the greatest men of our century." Letter from Heine to Moses Moser (July 22, 1825), in *id.* at 206. See Franz Finke, *Gustav Hugos Laudatio auf Heine*, 7 HEINE-JAHRBUCH 12 (1968). Heine immortalized Hugo by making an oblique humorous reference to him in the *Harzreise*; 6 HEINRICH HEINE, *HISTORISCH-KRITISCHE GESAMTAUSGABE* 88 (M. Windfuhr ed., 1973 [1824]).

104. For biographical accounts, see O. Mejer, *Gustav Hugo, der Begründer der historischen Juristenschule: Eine Göttinger Erinnerung*, 49 PREUBISCHE JAHRBÜCHER 457 (1879); O. Meyer, 13 ALLGEMEINE DEUTSCHE BIOGRAPHIE 321 (1881). In addition to the literature cited below, see Arno Buschmann, *Ursprung und Grundlagen der geschichtlichen Wissenschaft: Untersuchungen und Interpretationen zur Rechtslehre Gustav Hugos* (diss. U. Münster 1963). Marx's father-in-law studied under Hugo in the 1790s. MONZ, *supra* note 21, at 323.

105. JAMES WHITMAN, *THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE* 87 (1990).

106. PETER REILL, *THE GERMAN ENLIGHTENMENT AND THE RISE OF HISTORICISM* 188 (1975).

Critical Legal Studies—it did not lend itself to teaching young people, who were driven “crazy” by Hugo’s critique of all possible individual legal propositions.¹⁰⁷

Hugo himself anticipated that his contemporaries would find it difficult to pigeon-hole him politically. In a notice of the first edition of his *Textbook on Natural Law* in 1798, he speculated on the confusion that would befall reviewers: “Is the author supposed to be an aristocrat? . . . Does one wish to make him into a democrat, a Jacobiner, a true ultrarévolutionnaire?”¹⁰⁸ And at the very end of his long career he was still boasting that before St. Simon and the communists he had in all the editions of that *Textbook* written most about the abolition of private property.¹⁰⁹

Posterity lived up to his expectations. One of his conservative contemporaries charged that from Hugo’s analysis “one would almost regard bourgeois society as a conspiracy of the rich for the oppression of the poor.”¹¹⁰ Later generations of scholars have also not known quite what to make of Hugo. Wilhelm Roscher, for example, the founder of the German historical school of economy, who attested that Hugo’s ingenious paradoxes had sparked reexamination of dogmas that had hardened into economic axioms, conceded that it was not always easy to tell where seriousness ended and irony began.¹¹¹ For the better part of two centuries legal historians have puzzled over how “the co-founder of the great bourgeois legal science of the 19th century” could simultaneously subscribe to what they variously describe as “socialist,” “communist,” and “ultracommunist” views.¹¹² The author of a Nazi-era monograph on Hugo was still astounded that Hugo’s *Textbook on Natural Law* at times read like “a work of agitation from the stormiest period of grave social struggles.”¹¹³ The most balanced presentations, more as reflections of the

107. AUGUST REHBERG, POLITISCH-HISTORISCHE KLEINE SCHRIFTEN, in 4 SÄMTLICHE SCHRIFTEN 106 (1829). On Rehberg’s view of Hugo, see KLAUS EPSTEIN, THE GENESIS OF GERMAN CONSERVATISM 579-82 (1975 [1966]).

108. 1 [GUSTAV] HUGO, BEYTRÄGE ZUR CIVILISTISCHEN BÜCHERKENNTNIS: 1788 . . . 1807, at 368 (1828).

109. 3 [GUSTAV] HUGO, BEYTRÄGE ZUR KENNTNIS CIVILISTISCHER BÜCHER SEIT 1788: LETZTER BEYTRAG 8-9 (1844).

110. REHBERG, POLITISCH-HISTORISCH KLEINE SCHRIFTEN, *supra* note 107, at 115.

111. WILHELM ROSCHER, GESCHICHTE DER NATIONAL OEKONOMIK IN DEUTSCHLAND 913 (1874). Marx’s contempt for Roscher was boundless; see, e.g., KARL MARX, ZUR KRITIK DER POLITISCHEN ÖKONOMIE (MANUSKRIFT 1861-1863), in 2:3, pt. 4, MARX [&] ENGELS GESAMTAUSGABE (MEGA) 1500 (1979).

112. Theodor Viehweg, *Einige Bemerkungen zu Gustav Hugos Rechtsphilosophie*, in FESTSCHRIFT FÜR KARL ENGELCH ZUM 70. GEBURTSTAG 80, 88 (1969); 3:2 ERNST LANDSBERG, GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT 23 (1910); FRITZ VON HIPPEL, GUSTAV HUGOS JURISTISCHER ARBEITSPLAN: EIN BEITRAG ZUR WIEDERGEWINNUNG JURISTISCHER ARBEITSEINHEIT 42 (1931).

113. HEINRICH WEBER, GUSTAV HUGO: VOM NATURRECHT ZUR HISTORISCHEN SCHULE:

state of scholarly bewilderment than as explanations, speculate that rather than having been inspired by socialism, Hugo was in the aporetic philosophical tradition, which found the world puzzling,¹¹⁴ or a "cosmopolitan, skeptical, independent spirit."¹¹⁵

The relationship between Hugo and the Historical School of Law has also been in dispute for the better part of two centuries. This issue is of particular importance here because Marx specifically characterized Hugo's *Textbook of Natural Law* as the source, philosophy, and Old Testament, and Hugo himself as the forebear and creator of the Historical School of Law.¹¹⁶ Yet Friedrich Stahl, the anti-rationalist and anti-natural law creator of a conservative Christian state theory, whom Marx considered both the official Prussian state philosopher in 1842 and in the tradition of Hugo,¹¹⁷ expressly disavowed Hugo as part of the Historical School on the ground that his *Textbook on Natural Law* lacked any understanding of the role of the ethical (*sittlich*) individuality and purpose of the *Völker* or of the continuity and tradition of legal development.¹¹⁸ Later scholars, too, have been much more skeptical of the lineage postulated by Marx.¹¹⁹ Thus, for example, Ernst Landsberg, the author of a standard many-volumed history of German legal thought, took the position that Hugo had founded modern legal science as a historical-empirical discipline by destroying the old natural law doctrine, but had not been the founder of the Historical School in the narrow sense. The latter intellectual movement, which came to the fore in the wake of the French Revolution and

EIN BEITRAG ZUR GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT 34 n.1 (1935).

114. F. EICHENGRÜN, DIE RECHTSPHILOSOPHIE GUSTAV HUGOS: EIN GEISTESGESCHICHTLICHER BEITRAG ZUM PROBLEM VON NATURRECHT UND RECHTSPOSITIVISMUS 101 (1935).

115. GIULIANO MARINI, L'OPERA DI GUSTAV HUGO NELLA CRISI DEL GIUSNATURALISMO TEDESCO 148 (1969).

116. Karl Marx, *Das philosophische Manifest der historischen Rechtsschule*, in 1:1 MARX [&] ENGELS, GESAMTAUSGABE (MEGA) 191, 192 (1846).

117. *Denkschrift betreffend die Unterdrückung der "Rheinischen Zeitung,"* in 1:1 MARX [&] ENGELS, GESAMTAUSGABE (MEGA), at 392, 401 (1843) (Marx was probably author); Marx, *supra* note 116, at 198. On Stahl, see HERBERT MARCUSE, REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY 362-74 (1966 [1941]).

118. FRIEDRICH STAHL, DIE PHILOSOPHIE DES RECHTS: GESCHICHTE DER RECHTSPHILOSOPHIE 585 (3d ed. 1854 [1829]).

119. Savigny's polite praise for Hugo at the time of the celebration of the fiftieth anniversary of Hugo's doctorate does not weigh heavily. FRIEDRICH CARL VON SAVIGNY, *Der zehente Mai 1788*, in VERMISCHTE SCHRIFTEN 195, 197-98 (1850 [1838]). For more modern statements of Hugo's achievement, see Taranowsky, *Leibniz und die sogenannte äußere Rechtsgeschichte*, 72 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE (GERMANISTISCHE ABTEILUNG) 190, 207 (1906); JAN SCHRÖDER, WISSENSCHAFTSTHEORIE UND LEHRE DER "PRAKTISCHEN JURISPRUDENZ" AUF DEUTSCHEN UNIVERSITÄTEN AN DER WENDE ZUM 19. JAHRHUNDERT 158-59 (1979).

Napoleonic turbulence, sought to transfix the past. These romantic-rationalist essential components of the organic growth of a *Volksgeist* were, however, alien to Hugo, whose explanatory historical framework recognized exclusively individual tangible factors.¹²⁰

For all its devotion to historical sources, the Historical School of Law drew a rigid line between historical evolution and conscious development; the kinds of cultural institutions in which the traditions of community life were passed down made the enactment of legislation superfluous. The School's traditionalism shared with Enlightenment rationalism "the fiction of the existence of a natural man whose fixed original nature provided the standard for what was reasonable or unreasonable, possible or impossible in social institutions." But in contrast to the rationalists' belief that "man's original nature could express itself consistently, and be ruled by reason, Hugo believed that man's original nature was such that no rational organisation of social life was possible upon it as a basis." Hugo's extreme and reactionary historicism was only the obverse of the appeal to and insistence on the absolute validity of abstract ethical ideals outside of a specific socio-economic context.¹²¹

In Hugo's so-called natural law, which abandoned the evaluation of the substantive justice of law in favor of the determination of its mere positive existence, the swing from the extreme of juridical logicism to that of juridical empiricism took firm root.¹²² Consequently, Hugo's critique of rationalist supra-positive natural law and his alternative positivist model of an empty and empirically infinitely expandable form of law to be filled with contents by means of a historically oriented juristic anthropology¹²³ left the practical

120. 3:2 LANDSBERG, *supra* note 112, at 40-47, 207-212. For similar opinions, see Landsberg, *Zur ewigen Wiederkehr des Naturrechts*, 18 ARCHIV FÜR RECHTS- UND WIRTSCHAFTSPHILOSOPHIE 365, 367 (1924/25); Heinrich Singer, *Zur Erinnerung an Gustav Hugo*, 16 GRÜNHUTS ZEITSCHRIFT FÜR DAS PRIVAT- UND ÖFFENTLICHE RECHT 273, 282 (1889); Gunnar Rexius, *Studien zur Staatslehre der historischen Schule*, 107 HISTORISCHE ZEITSCHRIFT 496, 505-09 (1911). In developing a sociological framework for understanding ideological generations, Mannheim speculated that Hugo may have avoided the irrationalist turn of the Historical School he founded because, unlike Savigny and his generation, Hugo did not experience the German war of liberation in his youth. KARL MANNHEIM, *Das Problem der Generationen*, in WISSENSSOZIOLOGIE (1964 [1928]). WHITMAN, *supra* note 105, at 91, can interpret Hugo as a romantic by using the term in the sense of non-practice-oriented. In this sense, the positions of Savigny and Hugo would be reversed. See f., *Das Wollen der historischen Schule und ihr Vollbringen*, HALLISCHE JAHRBÜCHER FÜR DEUTSCHE WISSENSCHAFT UND KUNST, No. 203, at col. 1617, 1620 (Aug. 24, 1838); HEINZ WAGNER, DIE POLITISCHE PANDEKTISTIK 122-26 (1985).

121. SIDNEY HOOK, FROM HEGEL TO MARX: STUDIES IN THE INTELLECTUAL DEVELOPMENT OF KARL MARX 137, 142 (1936).

122. CHRISTOPH SCHEFOLD, DIE RECHTSPHILOSOPHIE DES JUNGEN MARX 16 (1970).

123. See Jürgen Blühdorn, *Naturrechtskritik und "Philosophie des positiven Rechts"*, *zur Begründung der Jurisprudenz als positiver Fachwissenschaft durch Gustav Hugo*, 41

judgment of law in a precarious position. Thus Hugo emphasized that his objections to legal relations that until then had been almost universally accepted were merely designed to demonstrate that they could all be quibbled over—that is, there was not a single one that was not contrary to someone's freedom or founded on chance or strength. By the same token, however, such reasoning did not mean that "one could not live in them with a good conscience."¹²⁴ Precisely because legal truths were not "a priori, pure, universal, necessary, or given in (sound) reason," but merely "a posteriori, empirical, different according to time and place, contingent, to be learned from one's own and others' experience of facts, historical," they were supported only by the individual's duty of conscience to enter into a juridical state of affairs (*rechtlicher Zustand*) "if others want it and to submit to it no matter . . . how very much it might deviate from that which would be in complete conformity with the highest demands of reason. . . ."¹²⁵ Hugo succinctly captured the contrast between the outgoing rationalist natural law thinking and the positivist legal revolution¹²⁶ that he was propelling: "Whereas all philosophizing rests on inquiry, on thinking for oneself, on independence from others' prescriptions, the whole legal field [*alles Juristische*] is a matter of learning, of submitting to that which just happens to be."¹²⁷

Against the background of this program of quietistic conformity, even anti-Marxist legal scholars were constrained to agree with Marx's assessment that, for all his *pour épater le bourgeois* provocations, inevitably Hugo "the revolutionary made peace with the rulers of this earth" because the effort to vindicate meta-norms—and the concomitant refusal to accept any and every prevailing social order—would have engendered anarchy.¹²⁸ Indeed, Hugo, in a passage in the preface to his *Textbook* that Marx did not cite, programmatically confirmed Marx's interpretation by lecturing his critics who had reproached him alternatively for objecting to

TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 3, 8, 15-17 (1973); Viehweg, *supra* note 112, at 86-87; Ernst Landsberg, *Kant und Hugo: Philosophisches und Civilistisches von 1800 und 1900*, 28 GRÜNHUTS ZEITSCHRIFT FÜR DAS PRIVAT- UND ÖFFENTLICHE RECHT 670, 673 (1901).

124. HUGO, *supra* note 108, at 376.

125. 1 [GUSTAV] HUGO, *LEHRBUCH EINES CIVILISTISCHEN CURSUS: LEHRBUCH DER JURISTISCHEN ENCYCLOPÄDIE* 19-20 (8th ed. 1835).

126. Austin, who studied in Bonn in the 1820s, read and is said to have been influenced by him. ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 98-99 (1967 [1923]); WILLIAM L. MORISON, *JOHN AUSTIN* 20, 61-62 (1982).

127. 2 [GUSTAV] HUGO, *LEHRBUCH EINES CIVILISTISCHEN CURSUS: LEHRBUCH DES NATURRECHTS, ALS EINER PHILOSOPHIE DES POSITIVEN RECHTS* 1 (4th ed. 1819 [1798]).

128. WEBER, *supra* note 113 at 36; Rexius, *supra* note 120, at 507-09; VON HIPPEL, *supra* note 112, at 45-46. These authors agreed with Marx objectively regardless of whether they had read his attack on Hugo (as, for example, von Hippel had).

everything in positive law and defending everything: could they not see that "precisely the former is the means and condition of the latter"?¹²⁹

By the same token, however, Hugo's skepticism vis-à-vis various social institutions had a critical side to it that invites interpretation as an approach not neatly captured by Marx's derision as mere profanation of everything that is sacred to *sittlich* people and a glorification of and resignation before the irrational for the purpose of consolidating its positivity.¹³⁰ Thus Marx completely neglected the attention that Hugo devoted to the system of private property—which according to Hugo was "not necessary"¹³¹—and its structural consequences for the poverty of the masses. The exclusive use and control that private laws conferred often caused many individuals and society as a whole to suffer, especially where the thing possessed was of greater importance to them than to the person who happened to own it and who was more concerned about the precedent that violation of this particular right might establish for other rights. Hugo emphasized the poverty, hunger, and poor health that poor people suffered in part because of the "disgusting" work—such as child labor at machines and cleaning chimneys—that they had to perform to survive.¹³² Nor did the political sphere permit the poor to overcome their economic disadvantages: the best constitution was of no help, the rich could turn the administration of justice into yet another means of oppression, while the crimes of the poor were punished more severely than those of the rich.¹³³ Hugo asked rhetorical questions that classical political economy was not yet ready to pose such as: What good was freedom to a poor person whom no one was willing to employ? To some extent orthodox economics is still unwilling to draw the conclusions that Hugo drew two centuries ago with regard to the disadvantageous labor market conditions of those whose poverty requires them to transact urgent business: "No constitution can be good where there are many who are ready to sell

129. HUGO, *supra* note 127, at xiv. See also 2 [GUSTAV] HUGO, BEYTRÄGE ZUR CIVILISTISCHEN BUCHERKENNTNIS: 1808 . . . 1827, at 653 (1829). (legal philosopher must contest everything in order to justify everything). In this sense, the claim that Marx "largely misunderstood or caricatured the conservatism of the Romanist lawyers" is incorrect. WHITMAN, *supra* note 105, at xii.

130. Marx, *supra* note 116, at 192.

131. HUGO, *supra* note 127, at 134.

132. *Id.* at 116-17, 120-21. Hugo also attended to the cultural consequences of poverty: "Poverty is the strictest ban on books." *Id.* at 123. Reporting on the lament that immorality in the lower classes was fueled by boys' and girls' sharing the same bed, he commented caustically that prohibiting it was doubtless easier than giving the poor more beds. *Id.* at 125 n.3.

133. *Id.* at 126.

themselves and others who can make use of it."¹³⁴

Hugo's juristic anthropology proceeded from the assumption that animality was the foundation of reason inasmuch as the latter could not prescribe anything that was incompatible with the former; moreover, animality was universal whereas some people lacked reason.¹³⁵ As applied to the sexual instinct (*Geschlechtstrieb*), animality rested in part on a need that, however, neither occurred in all people nor, if not satisfied, could easily become mortal.¹³⁶ As an example, presumably, of animality in action, Hugo adduced the following Kant-like scenario: "The female sex can to some extent be used for the satisfaction of the sex drive without in the least participating in the enjoyment. Herein too may lie a physical reason for jealousy."¹³⁷

At this point, however, Hugo's discussion of women took an abrupt turn away from Kant and virtually all other enlightenment-era lawyers and philosophers and toward the irreverent inversions of convention in which Hugo apparently delighted. Significantly, Marx passed over in silence all of Hugo's paradoxes that either raised serious social questions or suggested forward-looking positions at which Marx himself had not yet arrived. Instead, for polemical purposes Marx focused on the more scurrilous aspects of Hugo's skepticism such as his defense of slavery as provisional law. Hugo began his discussion of marriage by asserting that marriage was much less essential and in accordance with reason than philosophers believed.¹³⁸ The fact that in marriage a person, especially the woman, "was treated by the other as a means for the satisfaction of his needs" showed that it was "not always *unsittlich* to treat the body of another person as a means to an end, as . . . Kant himself misunderstood the term." What was unreasonable about marriage was that "the satisfaction of the sexual instinct is legally permitted even where it is contrary to the perfection of the spouses, or of the children expected therefrom, or of the whole because too many children are produced, who now become a burden to the whole, and either themselves must perish, or however cause others to perish."¹³⁹ To the extent that a marriage license was also a license to procreate without regard to the ensuing social costs (or, in some cases, even to

134. *Id.* at 130, 133. A leading labor economist has asserted that because "[i]ncreasingly, people are being paid for the disutility of their work," professors will be paid less and the supply of farm workers will dry up. CLARK KERR, *The Prospect for Wage and Hours in 1975*, in *LABOR AND MANAGEMENT IN INDUSTRIAL SOCIETY* 203, 219 (1964 [1958]).

135. HUGO, *supra* note 127, at 52.

136. *Id.* at 70.

137. *Id.* at 71 n.2. On Kant's view of women, see *infra* § II.D.

138. HUGO, *supra* note 127, at 276.

139. *Id.* at 279.

the private costs to the persons involved), Hugo did point to an irrationality inherent in a social system—but especially in an absolutist state—in which the link between private copulation and public population was subject to no overall planning designed to adjust the needs of the former to the latter.

What appeared even “more dubious” to Hugo was the ban on sex outside of marriage. In a phrase that piqued Marx, Hugo argued that such a limitation was contrary to reason because it presupposed omniscience especially when one obligated oneself to satisfy one of the most impetuous instincts of nature only with one certain person and only when that person also feels it or at least “is accommodating enough to lend himself or herself to it. . . .”¹⁴⁰ Even worse was the compulsion not to abstain from sex embodied in § 694 of the marriage provisions of the Prussian General Code, which made “obstinate and continual refusal of the marital duty” a ground for divorce. For Hugo this was “the most wrongheaded application of compulsion” because “if it is to be more than gross animal enjoyment,” sex—as Friedrich Engels later agreed¹⁴¹—depended on one’s physical condition and “the affection of the heart”; yet who could promise both ahead of time and judge them in another? Prosaically anticipating Bertolt Brecht’s poetic complaint,¹⁴² Hugo asked: “Is there anything more outrageous than when husband and wife litigate against each other over the frequency of intercourse?”¹⁴³ In addition to having identified an absurdity in the Code, Hugo proposed an alternative set of arrangements. One was “completely free love, in which the sex drive would thus be left completely to the conscience of each, like friendship and every other intimacy. . . .” The other involved the creation of public institutions subject to public law for the satisfaction of this drive and especially for procreation.¹⁴⁴ Ironically, elements of these proposals—such as treating childless marriages as friendships outside the scope of legal regulation or socialization of the costs of reproducing the next generation—later became acceptable to Marx the socialist.¹⁴⁵ Yet in 1842 Marx chose not even to mention them.

Two further points regarding women’s status within marriage raise the possibility that Hugo may not have been the fanatic reac-

140. *Id.* at 280. Hugo used the gender-neutral German term “person.”

141. FRIEDRICH ENGELS, *DER URSPRUNG DER FAMILIE, DES PRIVATEIGENTHUMS UND DES STAATS*, in 21 MEW 25, 83 (1962 [1884]).

142. BERTOLT BRECHT, *Über Kants Definition der Ehe in der Metaphysik der Sitten*, in 9 GESAMMELTE WERKE 609 (1968).

143. HUGO, *supra* note 127, at 283-84.

144. *Id.* at 284-85.

145. See Thilo Ramm, *Die künftige Gesellschaftsordnung nach der Theorie von Marx und Engels*, in 2 MARXISMUSSTUDIEN 77, 98 (1957).

tionary painted by Marx. Unlike the German idealist philosophers,¹⁴⁶ Hugo rejected the notion that reason itself prescribed husbands' domination over their wives; whether that regime or spousal equality was more reasonable was largely a function of that to which a people had become accustomed.¹⁴⁷ Although Hugo confused the issue in principle by framing custom as the basis of reason, in this particular case he injected some realism into the discussion by implying that beneath lofty philosophical notions of reason often lurked a mere codification of that which happened to be the prevailing custom. Hugo also stepped out of the role of skeptic into that of critic by characterizing as "disgusting" the judicial practice of making a wife's trip the ground for legal separation: "if our . . . customs were not better than our law, marriage, on which our entire social state is supposed to be built, would be a very rotten pillar."¹⁴⁸

As his work came to be surpassed by the founders of the Romantic current of the Historical School of Law, in particular by Savigny,¹⁴⁹ Hugo's writings degenerated into a pathetic and almost clownish solipsistic self-apologia. His review, for example, of Hegel's *Philosophy of Right* was superficial (literally: devoting a paragraph to the book's two title pages) and polemical, containing no analysis of Hegel's theory; a third of it was devoted to Hegel's passing mention of Hugo in an introductory section.¹⁵⁰ There Hegel had emphasized that historical explanation and justification of a legal rule (*Rechtsbestimmung*) should not be conflated with the meaning of valid justification per se. From this distinction between genesis and validity it followed for Hegel that such rules could be shown to derive in a perfectly well founded and consistent manner from existing legal institutions and yet be non-lawful (*unrechtlich*) and unreasonable.¹⁵¹ Hegel promptly responded to Hugo's review by asking the reader to judge the unworthiness of Hugo's "gossip-twaddle."¹⁵²

146. See *infra* § II.D.

147. HUGO, *supra* note 127, at 289-90.

148. *Id.* at 333 n.4.

149. FRANZ WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT* 378, 381 (2d ed. 1967).

150. 1821 GÖTTINGISCHE GELEHRTE ANZEIGEN 601. Hugo was, however, not totally without humor in seeking some connection between the book's dual title pages and Hegel's dialectic. According to JOHANNES MERKEL, *GUSTAV HUGO* 18 (1900), Hugo admitted that he had not even made the effort to acquaint himself with Hegel's natural law theories.

151. GEORG WILHELM FRIEDRICH HEGEL, *GRUNDLINIEN DER PHILOSOPHIE DES RECHTS* § 3, at 22-28 (1967). Hegel's marginal notes to this section in his own copy of the book scorned Hugo's anti-theoretical approach. *Id.* at 305-06. Although Hegel had in mind Hugo's textbook on the history of Roman law, Hugo's positivistic evaluation of contemporary institutions also formed the focus of Marx's critique.

152. 7 GEORG WILHELM FRIEDRICH HEGEL, *WERKE* 521-22 (1969) ("Klatschgewäsch-

Unable to refrain from rising to the occasion, eight years later Hugo reprinted his review, this time adding a weighty paragraph devoted to unmasking Hegel's use of "D." before his name on the title page as an illicit transmutation of his master's degree into a doctorate.¹⁵³

The two towering figures in German Marxist philosophy have interpreted Hugo's contribution to jurisprudence quite differently. For Georg Lukács the bourgeoisie in its revolutionary period took as its point of departure that the formal equality and universality of law, its rationality, was also able to give content to the law. The bourgeoisie refused to recognize the basis for the validity of a legal relationship in its mere facticity. This thought was so pervasive that even the conservative opponents of the revolutionary bourgeoisie were constrained to develop an alternative natural law doctrine. After the partial victory of the bourgeoisie, a critical-historical version of natural law permeated both camps according to which the content of law was purely factual and could not be comprehended by formal legal categories. Of the demands of natural law, only the notion of a gapless structure of the formal legal system remained. "Thus the primitive, cynical-skeptical struggle against natural law that the 'Kantian' Hugo began at the end of the 18th century receives a 'scientific' form." Hugo's naive-cynical positivistic frankness expressed the coming structure of law in bourgeois society: "When 'critical' jurists assign the exploration of the content of law to history, sociology, law, etc., they are in the final analysis doing nothing else than what Hugo had already demanded: methodically abandoning the capacity to be based on reason [*vernunftgemäße Begründbarkeit*], the substantive rationality of the law."¹⁵⁴

Ernst Bloch, writing two generations later, took a somewhat more conciliatory view of Hugo than did Lukács. Bloch agreed that natural law was already on shaky ground once bourgeois society was no longer convinced of its ability to generate principles that were absolutely necessary and rationally derivable. In the wake of Thermidor, Hugo, a "soi-disant Kantian," caused the downfall of both the construction and the ideal of natural law. The turning away from the a priori construction of natural law was fruitful for research in legal history by casting law as subject to change and the expression of socioeconomic and power relations. But the abandonment of the ideal, associated at the outset with Hugo's "reactionary cynicism a posteriori," was not so much an elimination of a priori

es"). See generally Hanns Ritter, *Eine polemische Erklärung Hegels zur Rechtsphilosophie*, 5 HEGEL-STUDIEN 31 (1969).

153. HUGO, *supra* note 129, at 465 n.1.

154. GEORG LUKÁCS, *GESCHICHTE UND KLASSENBEWUSTSEIN: STUDIEN ÜBER MARXISTISCHE DIALEKTIK* 119-20 (1923).

constructions as of the revolutionary impulse that judged existing law from the standpoint of "reason a priori." It was replaced by "completely empty construction," which was much less critical of legal facts than the allegedly unworldly natural law approach had been of legal facts under the absolutist regimes.¹⁵⁵

C. *Divorce Law in Germany*¹⁵⁶

Because Marx's critique of Hugo was an outgrowth of the debate over the reform of Prussian divorce-law reform in 1842, it will be impossible to make sense of it without understanding the evolution of divorce law in Germany from the end of the eighteenth to the middle of the nineteenth century. Although the Prussian Code (*Allgemeines Landrecht für die Preußischen Staaten [ALR]*)¹⁵⁷ was scarcely a non-sexist model, it did represent an advance over previous European legislation.¹⁵⁸ In particular its divorce provisions, which went into effect in 1794, were, with the exception of the short-lived regime of the French Revolution,¹⁵⁹ arguably the most liberal and "women-friendly"¹⁶⁰ in the world not only at the time of enactment but into the twentieth century:¹⁶¹ "Almost a century earlier

155. ERNST BLOCH, *NATURRECHT UND MENSCHLICHE WÜRDE* 103, 106 (1985 [1961]). Another way of characterizing Hugo's twofold impact is that he had a corrosive effect on natural law while adapting Kantian formalism to historical empiricism. ANTONIO NEGRI, *ALLE ORIGINI DEL FORMALISMO GIURIDICO* 370 (1962).

156. For an overview, see Evelyn Kühn, *Die Entwicklung und Diskussion des Ehescheidungsrechts in Deutschland: Eine sozialhistorische und rechtssoziologische Untersuchung* (1974) (unpublished Ph.D. dissertation, University of Hamburg).

157. Many of the marriage and divorce provisions of the ALR were prefigured in the "Project des Corpus iuris Fridericiani" and edicts reaching as far back as 1749. See EDUARD HUBRICH, *DAS RECHT DER EHESCHIEDUNG IN DEUTSCHLAND* 179-86 (1891).

158. See SUSANNE WEBER-WILL, *DIE RECHTLICHE STELLUNG DER FRAU IM PRIVAT-RECHT DES PREUSSISCHEN ALLGEMEINEN LANDRECHTS VON 1794* (1983).

159. The preamble to the French decree of 1792, a pure expression of the natural law-contractualist-eudemonian view of marriage, referred to the importance of enabling the French to enjoy ease of divorce resulting from individual freedom and characterized marriage as "only a civil contract." The decree provided, *inter alia*, for divorce by mutual consent and by unilateral allegation of incompatibility of tempers or character. *Décret qui détermine les causes, le mode et les effets du divorce*, Sept. 20, 1792, § I art. 2-3, 4 Duv. & Boc. 476, 477. These provisions were abolished by the *Loi sur l'abolition du divorce*, May 8, 1816, 20 Duv. & Boc. 379. See generally JAMES TRAER, *MARRIAGE AND THE FAMILY IN EIGHTEENTH-CENTURY FRANCE* (1980).

160. For a feminist historical appreciation of the marriage provisions of the ALR, see UTE GERHARD, *VERHÄLTNISSE UND VERHINDERUNGEN: FRAUENARBEIT, FAMILIE UND RECHTE DER FRAUEN IM 19. JAHRHUNDERT* 154-89 (1981 [1978]). The law as well as the public discussion of law reform were paternalistic in both senses inasmuch as women were constitutionally excluded from the debate.

161. See WOLFRAM MÜLLER-FREIENFELS, *EHE UND RECHT* 120-34 (1962); Anders Agell, *Grounds and Procedures Reviewed, in ECONOMIC CONSEQUENCES OF DIVORCE: THE INTERNATIONAL PERSPECTIVE* 53, 54-55 (Lenore Weitzman & Mavis Maclean eds., 1992).

than in England and France . . . the Prussian woman was granted not only a moral, but also a legal claim to the faithfulness of her spouse."¹⁶² And in 1896, as the German parliament was in the process of repealing the divorce provisions of the ALR in the new Civil Code, August Bebel, the leader of the German Social Democrats, praised the ALR for being "too liberal" for the majority of parliamentarians even after a hundred years.¹⁶³

In addition to specifying fault-based divorce grounds such as "malicious desertion" and "obstinate and continuous refusal of the marital obligation," the ALR provided for divorce of "[c]ompletely childless marriages . . . on the basis of mutual agreement. . . ."¹⁶⁴ Sanctioning divorce based on the spouses' will marked a qualitative break with the Christian conception of the marriage as *pactum supra partes*.¹⁶⁵ And although in some settings some women have opposed easier divorce as an isolated measure on the ground that it might cause them to lose certain economic guarantees associated with marriage,¹⁶⁶ in nineteenth-century Prussia non-upper-class women filed the large majority of divorce suits.¹⁶⁷ The ALR was marked by a further egalitarian feature: a woman's sexual impulses were acknowledged in that she had the same entitlement to satisfac-

162. MARIANNE WEBER, *EHEFRAU UND MUTTER IN DER RECHTSENTWICKLUNG: EINE EINFÜHRUNG* 336 (1907).

163. 4 STENOGRAPHISCHE BERICHTE ÜBER DIE VERHANDLUNGEN DES REICHSTAGS, IX. LEGISLATURPERIODE, IV. SESSION 1895/97, at 2938B (1896).

164. ALR, pt. 2, tit. 1, §§ 677, 694, 716 (1794). According to ERNST WOLF ET AL., *SCHEIDUNG UND SCHEIDUNGSRECHT: GRUNDFRAGE DER EHESCHIEDUNG IN DEUTSCHLAND* 34 (1959), "childless" in § 716 was interpreted very restrictively to mean not only current childlessness but also that no children were expected. Yet even where couples had children, courts still had discretion to order divorce in cases of unilateral repugnance. 4 FRANZ FÖRSTER, *PREUBISCHES PRIVATRECHT* 106 (7th ed. 1897).

165. See DIETER SCHWAB, *GRUNDLAGEN UND GESTALT DER STAATLICHEN EHEGESETZGEBUNG IN DER NEUZEIT BIS ZUM BEGINN DES 19 JAHRHUNDERTS* 242-43 (1967). Toward the end of the nineteenth century, even before the new Civil Code (BGB) ousted the liberal divorce provisions of the ALR, the German Supreme Court ruled that making the continuation of marriage depend on the will or the subjective uncontrollable discretion of the spouses was contrary to the essence of marriage. Consequently the court concluded that the recent development of marriage law had abandoned that ground of divorce. 15 RGZ 40 188, 191 (1886). The BGB adopted Savigny's conception of marriage as a *sittlich* legal order independent of the will of the husband and wife. See *infra*; Paul Mikat, *Zur Bedeutung Friedrich Carl von Savignys für die Entwicklung des deutschen Scheidungsrechts im 19. Jahrhundert*, in *FESTSCHRIFT FÜR FRIEDRICH WILHELM BOSCH ZUM GESBURTSTAG* 671, 693 (Walter Habscheid et al. eds., 1976).

166. Ernst Schachtel, *Das Recht der Gegenwart und die Autorität in der Familie*, in *STUDIEN ÜBER AUTORITÄT UND FAMILIE: FORSCHUNGSBERICHTE AUS DEM INSTITUT FÜR SOZIALFORSCHUNG* 587, 593-95 (1936).

167. Dirk Blasius, *Bürgerliche Rechtsgleichheit und die Ungleichheit der Geschlechter: Das Scheidungsrecht im historischen Vergleich*, in *BÜRGERINNEN UND BÜRGER: GESCHLECHTERVERHÄLTNISSE IM 19. JAHRHUNDERT* 67, 75-78 (Ute Frevert ed., 1988).

tion of the "marital obligation" and the same right to sue for divorce and to satisfy her sexual instinct lawfully if her spouse refused to comply.¹⁶⁸

To be sure, the Code was based on an instrumental model in which divorce was permissible in order to fulfill certain purposes, in particular procreation, which transcended the individual relationship; yet the marriage provisions in the ALR also addressed the pursuit of individual happiness by expressly making "mutual support" an independent basis of marriage.¹⁶⁹ The ALR, while not reaching as far as the eudemonistic-liberal principle of termination by either party at any time, was nevertheless "the earliest of modern divorce laws which embodied this 'principle of breakdown' that had been postulated by the thinkers of the Enlightenment as every individual's inalienable right to the pursuit of happiness, but which has been consistently condemned by religious, especially Roman Catholic, conservatives as being incompatible with the ideal of Christian marriage."¹⁷⁰ This relatively modern character of Prussian divorce law is startling given the enormous differences between late-eighteenth-century absolutist-mercantilist and contemporary societies and the fact that the specifically Prussian natural law of the ALR emerged as a compromise from the crisis of feudalism in struggle with capitalist forms of development.¹⁷¹ Although a product of King Frederick II's particular adaptation of the Enlightenment, the Code's divorce provisions also represented the confluence of natural law contract theory and the state's population policy.¹⁷² The latter found clear expression in a royal cabinet order that preceded the promulgation of the ALR in which Frederick II stated that divorces

168. HEINRICH DÖRNER, *INDUSTRIALISIERUNG UND FAMILIENRECHT: DIE AUSWIRKUNGEN DES SOZIALEN WANDELS DARGESTELLT AN DEN FAMILIENMODELLEN DES ALR, BGB UND DES FRANZÖSISCHEN CODE CIVIL* 56-59 (1974). Husbands, especially in peasant families, in fact rarely afforded their wives an opportunity for orgasm. HEIDI ROSENBAUM, *FORMEN DER FAMILIE: UNTERSUCHUNGEN ZUM ZUSAMMENHANG VON FAMILIENVERHÄLTNISSSEN, SOZIALSTRUKTUR UND SOZIALEM WANDEL IN DER DEUTSCHEN GESELLSCHAFT DES 19. JAHRHUNDERTS* 86-87 (1982).

169. ALR, pt. 2, tit. 1, § 2; WEBER-WILL, *supra* note 158, at 60.

170. MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 10-11, 294 (1972).

171. See UWE-JENS HEUER, *ALLGEMEINES LANDRECHT UND KLASSENKAMPF* (1960); EPSTEIN, *supra* note 107, at 372-87.

172. In this they differed from the sociolegal structuring of the family by two later ideologically anti-liberal-capitalist societies—Nazi Germany and the German Democratic Republic—which sought to deprivatize marriage by eliminating the contractual roots and redirecting the relationship toward avowedly societal goals. See BERND RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG: ZUM WANDEL DER PRIVATRECHTSORDNUNG IM NATIONALSOZIALISMUS* 400-03 (1973 [1968]); GUNNAR HEINSOHN & ROLF KNEPER, *THEORIE DES FAMILIENRECHTS: GESCHLECHTSROLLEN-AUFHEBUNG, KINDESVERNACHLÄSSIGUNG, GEBURTENRÜCKGANG* 13-14 (1974).

should not be made so difficult as to hinder population growth: whereas spouses who were constantly embittered against each other would not produce any children, if they divorced and the woman married another man, children would issue after all.¹⁷³ This policy was reflected in a catch-all provision of the divorce law, which, while not, "as a rule," permitting divorce based merely on an allegation of aversion to the spouse not keyed to one of the statutory grounds, authorized judges to terminate "an unhappy marriage" where the aversion was so vehement and deeply rooted that no hope remained of "reconciliation and achievement of the purposes of matrimony."¹⁷⁴

By the 1840s, the principles of enlightened Frederician divorce law had become unacceptable to the conservative political-restorationist and rechristianizing tendencies of King Friedrich Wilhelm IV.¹⁷⁵ In seeking to reestablish pre-Enlightenment traditions, he found the romantic Historical School of Law congenial. It was therefore no coincidence that the same day—February 28, 1842—that he appointed that School's undisputed leader, Friedrich Carl von Savigny, Prussian Minister of Justice in charge of the Ministry for Law Revision,¹⁷⁶ he also issued a cabinet order demanding a revision of the ALR in order to remove those of its "principles contradicting the doctrines of Christianity." As guidelines for Savigny's Law Revision Commission the king signaled an intention to restrict the number of grounds for divorce.¹⁷⁷ This political and clerical restoration coalesced in efforts at reforming marriage law in which a supra-individual form of social order was to replace the individualistic concept underlying natural law contract doctrine. To the extent that the late-eighteenth-century conception of marriage combined indi-

173. HUBRICH, *supra* note 157, at 185-86 (citing Royal cabinet order of May 22, 1783). The same spirit pervaded the very first paragraph of the marriage code, which characterized the bearing and raising of children as the main purpose of marriage. ALR, pt. 2, tit. 1, § 1. Based on this order (and later under the ALR too), courts authorized divorces even if the spouses had children where there was no hope of reconciliation. HUBRICH, *supra* note 157, at 186, 200.

174. ALR, pt. 2, tit. 1, § 718a.

175. Friedrich Engels, *Friedrich Wilhelm IV., König von Preußen*, in 1 MEW 446 (1964 [1842]). Even as early as the 1820s and 1830s his father, Friedrich Wilhelm III, had set in motion preliminary reform plans guided by the same religious goals. See 2 ADOLF STÖLZEL, *BRANDENBURG-PREUSSENS RECHTSVERWALTUNG UND RECHTSVERFASSUNG* 517-19 (1888); HUBRICH, *supra* note 157, at 222; Mikat, *supra* note 165, at 680-81. On the religious background of the debate over divorce, see Douglas Klusmeyer, Jr., *Between Church and State: Prussian Marriage Law from the German Enlightenment Through the Foundation of the Second Empire* (1989) (unpublished Ph.D. dissertation, Stanford University).

176. GESETZ-SAMMLUNG FÜR DIE KÖNIGLICHEN PREUSISCHEN STAATEN 83 (1842).

177. STÖLZEL, *supra* note 175, at 531; DIRK BLASIUS, *EHESCHIEDUNG IN DEUTSCHLAND 1794-1945: SCHEIDUNG UND SCHEIDUNGSRECHT IN HISTORISCHER PERSPEKTIVE* 57-59 (1987).

vidual-psychological elements with rational planning by the absolute state, it tended to deny the autonomy and autonomous value of marriage, which the new Christian-institutional conception was designed to overcome. This rebirth of institutional thinking about marriage was aimed at both the regulatory perfectionism of the absolutist police state and the liberal neutrality that declared religion and morality private. By investing marriage with a moral-religious dimension, the restorationist view denied the competence of the legislator as well as of the individual marriage contract partners to construct the institution of marriage according to notions of expedience.¹⁷⁸

As an indispensable foundation of the state, marriage, in Savigny's view, was not to be patterned after pecuniary contracts, and thus had to remain independent of individual decision-making. Moreover, in the Christian era the *sittlich* elevation of the female sex was tied to monogamy, which however had to be legally secured against degeneration. Savigny was concerned that people, particularly in the lower classes, frequently embarked upon marriage frivolously or in contemplation of easy divorce. A reformed divorce law, by putting them on notice that their arbitrary will was subject to severe restraints, would discourage many marriages that were doomed to failure from the outset.¹⁷⁹ Savigny also played a key role in placing on the agenda the forms of extreme patriarchy that Fichte¹⁸⁰ had advocated but that the ALR had not adopted. Thus at the same time the divorce draft was being debated, Savigny submitted a revised draft of the penal code, which provided for much harsher penalties for women than men for committing adultery. The grounds were stereotypical: the woman's blame was greater because her importance "lies mainly in *sittlich* and sexual purity," loss of which destroyed her dignity.¹⁸¹

The process of secularization raised the question of the dissolu-

178. Stephan Buchholz, *Preußische Eherechtsreform im Vormärz (1830-1844): Ein Überblick*, in VORTRÄGE ZUR GESCHICHTE DES PRIVATRECHTS IN EUROPA 150, 151-52 (IUS COMMUNE, Special Issue No. 15, 1981) [hereinafter Buchholz, *Preussische Eherechtsreform*]; Stephan Buchholz, *Savignys Stellungnahme zum Ehe- und Familienrecht: Eine Skizze seiner rechtssystematischen und rechtspolitischen Überlegungen*, 8 IUS COMMUNE 148, 149-50 (1979) [hereinafter Buchholz, *Savignys Stellungnahme*].

179. FRIEDRICH CARL VON SAVIGNY, *Darstellung der in den Preussischen Gesetzen über die Ehescheidung unternommenen Reform*, in 5 VERMISCHTE SCHRIFTEN 222, 238-39, 246, 271 (1850 [1844]). But see RICHARD POSNER, SEX AND REASON 246-50 (1992) (policy of encouraging companionate marriage can with almost equal plausibility imply a policy of forbidding divorce or granting it at will on specified grounds).

180. See *infra* § II.D.

181. 2 REVISION DES ENTWURFS DES STRAFGESETZBUCHES VON 1843, at 162-63 (Minister of Justice von Savigny, Minister of Law Revision ed., 1845), reprinted in GERHARD, *supra* note 160, at 451.

bility of marriage, which even the Prussian form of the enlightenment answered by assimilating that relationship to contract. As the emerging opposition between the state and the individual began to oust the family in the beginning of the nineteenth century as an intermediate formation, the interior of the family was subject to dissolution in favor of individual-personal rights. Whereas the authoritarian-bureaucratic state tended to use contract-centered marital and family law as a means of placing the individual in its service, the conservative restoration abandoned the transient-human aspect as the standard for marriage; instead individuals were now to orient their *sittlich* volition toward the normative demands of an supra-individual institutional social existence. Savigny, however, opposed efforts to incorporate family relations into the private-law conceptual apparatus of individual wills. Instead, he advocated a supra-temporal yet secular structuring of the key question of marriage law—the relationship between the institutional side of marriage and the spouses' individual freedom—which differed from the rechristianizing model of Ernst Ludwig von Gerlach, whose long-term struggle against marital contract theory and liberal divorce was nourished by the alliance of a movement of pietistic renewal and conservative notions of ordering society through estates.¹⁸²

Much of the debate surrounding the new draft law took place in the columns of the *Rheinische Zeitung*, for which Marx had begun writing political commentaries in May 1842. A lead news article in late July reported that the opposition that Savigny's proposals had encountered even in higher civil servant circles was animating doubts about the fruitfulness of the Historical School in the area of practical jurisprudence; consequently, the draft marriage law, even though it may have been attributable less to the Historical School than to allied groups, would also meet with considerable opposition.¹⁸³ Later reports suggested that the draft had been prepared by a high judicial official—Privy Councillor Gerlach—with close ties to the royal house and feudal-conservative circles.¹⁸⁴ His modern pietistic convictions left clear marks in the proposed divorce law, which he saw as performing the same restorationist function vis-à-vis the ALR's "hostility to church, marriage, and law in general" as the

182. Buchholz, *Savignys Stellungnahme*, *supra* note 178, at 149-78; STEPHAN BUCHHOLZ, *EHERECHT ZWISCHEN STAAT UND KIRCHE: PREUBISCHE REFORMVERSUCHE IN DEN JAHREN 1854-1861*, at 5-15 (1981). Gerlach and his brothers had been largely responsible for placing divorce law reform on the agenda of the king and crown prince already in the 1830s. STÖLZEL, *supra* note 175, at 516-18.

183. *RHEINISCHE ZEITUNG*, No. 209, July 28, 1842, at 1, Col. 1.

184. *See generally* HANS SCHOEPS, *DAS ANDERE PREUSSEN* 9-142 (1952); 1 ERNST LUDWIG VON GERLACH, *AUFZEICHNUNGEN AUS SEINEM LEBEN UND WIRKEN 1795-1877*, at 320-21 (Jakob von Gerlach ed., 1903).

Napoleonic Code vis-à-vis the "revolutionary license" of the French decree of September 20, 1792.¹⁸⁵

To hammer away at the ideological underpinnings of the ALR proved to be a principal tactic in support of the draft. Georg Puchta, arguably the leading conceptual formalist among the pandectists, chose this rhetorical route in his polemical contribution.¹⁸⁶ Harking back to the aforementioned mercantilistic demographic basis of the ALR provisions, Puchta charged that the monopoly of private-law principles in that vision of marriage could be reconciled only with the state's interest in increased population. Since, his Swift-like argument ran, that interest was best promoted by completely unshackling divorce, the state qua breeder should logically eliminate divorce procedures altogether since no children were produced during that time and a more fruitful marriage was delayed.¹⁸⁷

Because Savigny sought to free the issue of marriage from the constraints of the transient political models grouped about the old conservatives' central concept of the "Christian state," his views did not resonate with them. In part because the extreme views of Gerlach—for whom the middle ages were "the ideal realization of social and state life"¹⁸⁸—which went beyond Savigny's and even the king's, prompted so much public opposition, the reform was aborted.¹⁸⁹ A further reason for the conservatives' failure to narrow

185. *Id.* at 316. Gerlach's brother Leopold wrote to him in July 1842 that the marriage draft law would be the first statute in a century that, expressly acknowledging the gospel, would penetrate into the innermost family relations and touch and be felt by all. *Id.* at 311. It was not so much the Code as the *loi Bonald* of 1816 that marked the real restoration in French divorce law. See DÖRNER, *supra* note 168, at 128-69.

186. Although Puchta defended the draft, he was opposed to Gerlach's efforts to introduce religion into law: "Dearest friend! when you sit up in the dark of night, and and mould *your state and your law*, do you not hear the communists next door carpentering and digging, separated from you only by a thin wall?" Letter from Puchta to Gerlach (Feb. 16, 1844), in *Materialien zur preußischen Eherechtsreform im Vormärz in NACHTRICHTEN DER AKADEMIE DER WISSENSCHAFTEN IN GÖTTINGEN AUS DEM JAHRE 1961*, Philologisch-Historische Klasse 500, 502 (1961).

187. Georg Puchta, *Zur Vorbereitung eines Urtheils über den Ehescheidungsentwurf*, in FLIEGENDE BLÄTTER DES TAGES: 1 DIE EHESCHIEDUNGSFRAGE 13 (1843). A reviewer noted that the original demographic justification of a more liberal divorce law was not the only possible one in support of the private-law character of marriage. K[arl]. N[auwerck], Review of F.G. Puchta, *Die Ehescheidungsfrage*, RHEINISCHE ZEITUNG, No. 38, Feb. 7, 1843, Supp., at 1, Col. 1. Interestingly, the censor reported to the Ministry of the Interior that he passed this review because its anticlerical polemic would cause Catholics to hate the paper. 1 RHEINISCHE BRIEFE UND AKTEN ZUR GESCHICHTE DER POLITISCHEN BEWEGUNG 1830-1850: 1830-1845, at 429 (Joseph Hansen, ed. 1967 [1919]) [hereinafter RHEINISCHE BRIEFE UND AKTEN].

188. 4 FRANZ SCHNABEL, DEUTSCHE GESCHICHTE IM NEUNZEHNTE JAHRHUNDERT: DIE RELIGIÖSEN KRÄFTE 487 (1951).

189. VON GERLACH, *supra* note 184, at 327; RHEINISCHE ZEITUNG, No. 217, Aug. 5, 1842, at 1, Col. 1; RHEINISCHE ZEITUNG, No. 234, Aug. 22, 1842, at 1, Col. 2; *Ein Wort*

the grounds for divorce in the 1840s is that Savigny and his collaborators underestimated both the resistance of public officials¹⁹⁰ and the degree to which the ALR had congealed into a piece of cultural reality deeply embedded in popular consciousness.¹⁹¹ The king was unwilling to take Gerlach's warning not to yield to public opinion; his reaction, however, was to tighten the censorship of the liberal press that had so effectively galvanized that opinion.¹⁹²

Although conservative reformers failed to enact changes in the substantive divorce provisions, in 1844 they did succeed in tightening divorce procedures which shaped the real world of divorce and privileged marriage as a political favored norm. The two most significant revisions were the appointment of a public prosecutor to represent the public interest in every matrimonial court and a mandatory clerical attempt at reconciliation as a precondition for filing suit for divorce.¹⁹³

D. *German Transcendental Philosophy's Chauvinist Stereotyping of Women and Marriage: La crème des DWEM*

In order to put Marx's views on women and marriage in their intellectual context, it is also necessary to present the views of German idealist philosophy—principally, Kant, Fichte, and Hegel—whose conceptual frameworks exercised enormous influence over educated public opinion in nineteenth-century Germany.¹⁹⁴

über Ehescheidungen, RHEINISCHE ZEITUNG, No. 240, Aug. 28, 1842, at 1, Col. 1; RHEINISCHE ZEITUNG, No. 258, Sept. 15, 1842, at 1, Col. 2; HUBRICH, *supra* note 157, at 222; Buchholz, *Savignys Stellungnahme*, *supra* note 178, at 165-66; Buchholz, *Preußische Eherechtsreform*, *supra* note 178, at 157-58.

190. Historians have assumed that a disgruntled privy councillor was the source of the leak of the draft law to the *Rheinische Zeitung*; despite considerable effort, the government never identified the source. 5 HEINRICH VON TREITSCHKE, *DEUTSCHE GESCHICHTE IM NEUNZEHNTEN JAHRHUNDERT* 251 (7th ed. 1920); HERMANN KÖNIG, *DIE RHEINISCHE ZEITUNG VON 1842-43 IN IHRER EINSTELLUNG ZUR KULTURPOLITIK DES PREUSSISCHEN STAATES* 15 (1927).

191. Even as staunch an enemy of the ALR as von Treitschke conceded this point; TREITSCHKE, *supra* note 190, at 250-54.

192. Divorce reform was also part of Gerlach's other agenda—reasserting the king's absolute power vis-à-vis the diets of the estates. See Ludwig von Gerlach, *Pro memoria, die Eherechtsreform betreffend*, in Hans Liermann & Hans-Joachim Schoeps (ed.), *Materialien zur preußischen Eherechtsreform im Vormärz*, in *NACHRICHTEN DER AKADEMIE DER WISSENSCHAFTEN IN GÖTTINGEN AUS DEM JAHRE 1961*, Philologisch-Historische Klasse 489, 525-34 (1961); STÖLZEL, *supra* note 175, at 538-47.

193. Verordnung über das Verfahren in Ehesachen, §§ 4, 10 Gesetz-Sammlung für die Königlichen Preussischen Staaten at 184, 185 (June 28, 1844); BLASIUS, *supra* note 177, at 53, 60-61, 64-67.

194. See generally Ute Frevert, *Bürgerliche Meisterdenker und das Geschlechterverhältnis: Konzepte, Erfahrungen, Visionen an der Wende vom 18. zum 19. Jahrhundert*, in *BÜRGERINNEN UND BÜRGER: GESCHLECHTERVERHÄLTNISSE IM 19. JAHR-*

Kant's views of marriage are most widely known for his brutally reductionist characterization of it in the *Metaphysics of Morals* as "the union of two persons of different sex for the lifelong possession of their sexual properties."¹⁹⁵ Less well known is the framework that Kant created for analyzing this relationship. He processed his radical reification of personhood and sex¹⁹⁶ through a new "daring" legal category that he devised late in life to merge a personal right with that to a thing: "This right is that of the possession of an external object as a thing and the use of the same as a person." The new right entailed "treating persons in a similar way to things, to be sure not in all points, but nevertheless to possess them and to deal with them in many relationships as things."¹⁹⁷ Kant considered a contract of marriage as prescribed by the laws of pure reason where man and woman wanted to enjoy each other's sexual properties mutually:

For the natural use which one sex makes of the sexual organs of the other is an enjoyment for which one part surrenders itself to the other. In this act a person makes himself into a thing, which conflicts with the right of humanity to its own person. Only under the single condition is this possible, that, inasmuch as the one person is acquired immediately by the other as thing, the latter mutually acquires the former; for in this way the person regains himself and again creates his personality. But the acquisition of a member in another human is at the same time acquisition of the whole person—because the latter is an absolute unity. . . . That, however, this personal right is yet at the same time as of a thing [auf dingliche Art] is founded thereon, because if one of the spouses goes astray or has sur-

HUNDERT 17 (Ute Frevert ed., 1988); CAROL PATEMAN, *THE SEXUAL CONTRACT* 168-81 (1988); Susan Mendus, *Kant: 'An Honest but Narrow-Minded Bourgeois'?* in *WOMEN IN WESTERN POLITICAL PHILOSOPHY: KANT TO NIETZSCHE* 21 (Ellen Kennedy & Susan Mendus eds., 1987); Joanna Hodge, *Women and the Hegelian State*, in *id.* at 127; Lawrence Blum, *Kant's and Hegel's Moral Rationalism: A Feminist Perspective*, 12 *CANAD. J. PHIL.* 287 (1982); EVA KELLNER-MANGER, *MANN UND FRAU IM DEUTSCHEN IDEALISMUS: DIE IDEE DER PERSÖNLICHKEIT IM KAMPF MIT DEM METAPHYSISCHEN BEGRIFFSPAAR FORM UND STOFF* (1937). On Kant's influence in particular, see URSULA JAUCH, *IMMANUEL KANT ZUR GESCHLECHTERDIFFERENZ: AUFKLÄRERISCHE VORURTEILSKRITIK UND BÜRGERLICHE GESCHLECHTS-VORMUNDSCHAFT* 33 (1980 [1988]).

195. "[D]ie Verbindung zweier Personen verschiedenen Geschlechts zum lebenswierigen Besitz ihrer Geschlechtseigenschaften." IMMANUEL KANT, *DIE METAPHYSIK DER SITTEN*, in 8 IMMANUEL KANT, *WERKE* 390 (Wilhelm Weischedel ed., 1956 [1797]). It is plausible that the frankness that, for example, Kant and Hugo displayed with regard to sexual matters was appropriate to the preindustrial family in which the physical aspect of sexual acts was emphasized and "their sensibility is not yet shown to be influenced by the marriage atmosphere of the bourgeoisie, which has become eroticised as a result of its economic relief—or by its taboos." DÖRNER, *supra* note 168, at 56.

196. Jauch alone appears to adhere to the Kant-struck construct according to which rather than having brutalized bourgeois marriage, Kant was in fact subjectively problematizing the reification and commodification to which women were subjected. JAUCH, *supra* note 194, at 152-53, 161, 164, 177.

197. KANT, *supra* note 195, at 481, 388-89, 482.

rendered itself into someone else's possession, the other is entitled at any time and without fail to bring the spouse back into his power likewise as a thing.¹⁹⁸

Kant's first illustration of his invention was the phrase "my wife" as opposed to "this is my father." Whereas the latter designated merely a physical relationship, the former signified "a special, namely legal relationship of the possessor to an object (even if it were a person), as thing."¹⁹⁹ Significantly, the non-familial example that Kant used to explicate this hybrid right was that of a farm worker living in the master's house (*Gesinde*) who, having been contractually "acquired" by the master, surrendered his person to the master's possession and consented to do any permissible act for the welfare of the master's household.²⁰⁰ Kant thus analogized the relationship between wife and husband to that between seller and buyer of the thing labor power so structured that the latter can use the former's labor as a thing and yet deal with the worker as a person.²⁰¹

Kant's reification of emotional-sexual relationships also had distinct roots in his detached understanding of sex as "cannibalistic"²⁰² and something of which one must be "ashamed

198. The passage reads in the original:

Denn der natürliche Gebrauch, den ein Geschlecht von den Geschlechtsorganen des anderen macht, ist ein Genuß, zu dem sich ein Teil dem anderen hingibt. In diesem Akt macht sich ein Mensch selbst zur Sache, welches dem Rechte der Menschheit an seiner eigenen Person widerstreitet. Nur unter der einzigen Bedingung ist dieses möglich, daß, indem die eine Person von einem anderen gleich als Sache erworben wird, diese gegenseitig jene erwerbe; denn so gewinnt sie wiederum sich selbst und stellt ihre Persönlichkeit wieder her. Es ist aber der Erwerb eines Gliedmaßes am Menschen zugleich Erwerbung der ganzen Person,—weil diese eine absolute Einheit ist. . . . Daß aber dieses persönliche Recht es doch zugleich auf dingliche Art sei, gründet sich darauf, weil, wenn eines der Eheleute sich verlaufen, oder sich in eines anderen Besitz gegeben hat, das andere es jederzeit und unweigerlich, gleich als eine Sache, in seine Gewalt zurückzubringen berechtigt ist.

KANT, *supra* note 195, at 390-91 (the word "person" in German does not reveal gender).

199. *Id.* at 482 n.*.

200. *Id.* at 484-85. On the *Gesinde's* customary one-year obligation, which was statutorily enforceable, see Karl Grünberg, *Agrarverfassung: Begriffliches und Zuständliches*, in 7 GRUNDRISSE DER SOZIALÖKONOMIK 131, 166 (1922).

201. UMBERTO CERRONI, *MARX UND DAS MODERNE RECHT* 45, 229-30 (Frank Zechmeister trans., 1974 [1962]), stresses this point but overlooks Kant's narrow notion of wage labor; Kant exempted day laborers who did not live in the master's house, were hired to perform specific work, and could leave the master at any time without the latter's having a right to "capture" him. Letter from Kant to Christian Schütz (July 10, 1797), in 12 KANT'S GESAMMELTE SCHRIFTEN 180, 182 (1902).

202. As an example Kant mentioned the phrase "to want to eat one up for love' (of which the kiss is a kind of attempt). . . ." Immanuel Kant, *Bemerkungen zur Rechtslehre*, in 20 KANT'S GESAMMELTE SCHRIFTEN 441, 462, 464 (1942 [1797]). Kant was also

because it is in itself really beneath the dignity of humanity"; resulting from the necessities of reproduction, it had to be left to "animal instinct" rather than reason.²⁰³ His approach attained an even more extraordinarily instrumental character in his unpublished *Relections on the Philosophy of Right*. There he excepted the sexual members from the natural arrangement that every person has absolute use of all his parts; for although they too belong to the person, insofar as they are to be used, another person must be given the right to do so. Thus as constructed by Kant in the language of the law, each person retains the property without use (*dominium directum*) of his or her own sexual member while granting the other beneficial ownership (*dominium utile*) of the same.²⁰⁴ This conception has prompted commentators to liken Kant's view of sex as "dehumanizing exploitation" to Marx's analysis of wage labor.²⁰⁵

More generally, Kant argued, humans are by nature the objects of others' desires and in turn are in need of others "as tools and themselves an object or tool for others' desires." That this drive causes humans to be subordinated to others "degrades humanity and brings it closer to animality than any other characteristic." Moreover, instead of offering a way out, masturbation would be

preoccupied with the health consequences of sex for men such as "being infected with impure juices" or dismemberment. *Id.* at 462, 463. Overexertion also lurked in the background: "Whether, with maw [Maul] and teeth, the female part through impregnation, and childbirth which perhaps result and is fatal for it, or the male however is consumed by the exhaustions stemming from the demands of the wife on the husband's sexual capacity . . . one part is with regard to the other, in this mutual use of the sexual organs, really a thing that can be used up (*res fungibilis*). . . ." Such a contract would be unlawful. KANT, *supra* note 195, at 483-84. Pateman's interpretation of Kant's construction of marriage as the husband's unilateral possession of the wife's body fails to deal with Kant's fears, which imply mutual rights. PATEMAN, *supra* note 194, at 171-72.

203. Kant, *supra* note 202, at 463-64. "Sexuality—especially masturbation and intercourse with women—is disgusting to Kant." HARTMUT BÖHME & GERNOT BÖHME, *DAS ANDERE DER VERNUNFT: ZUR ENTWICKLUNG VON RATIONALITÄTSSTRUKTUREN AM BEISPIEL KANTS* 452 (1983). See also ROGER SULLIVAN, *IMMANUEL KANT'S MORAL THEORY* 335 n.19 (1990 [1989]) ("Kant certainly had a low opinion of sexual intercourse even within marriage. . . . It is hard to avoid concluding that he would have preferred that Nature had provided some alternative method of procreation"). Kant may have found it unnecessary to discuss this issue at length because the towering German rationalist philosopher, Wolff, had already done so. CHRISTIAN WOLFF, *VERNÜNFTIGE GEDANKEN VON DEM GESELLSCHAFTLICHEN LEBEN DER MENSCHEN*, in 1:5 CHRISTIAN WOLFF, *GESAMMELTE WERKE* §§ 16-39, at 10-26 (4th ed. 1975 [1736]).

204. Immanuel Kant, *Reflexionen zur Rechtsphilosophie*, in 19 KANT'S *GESAMMELTE SCHRIFTEN*, No. 7580 at 460 (1934).

205. SUSAN SHELL, *THE RIGHTS OF REASON: A STUDY OF KANT'S PHILOSOPHY AND POLITICS* 152 (1980). See also [Carl A.] Emge, *Das Eherecht Immanuel Kants*, 29 KANT-STUDIEN 243, 245 (1924): "Use of a capacity means . . . something like valorization of labor power in the sexual field. Kant however pays no more attention to this attribute of his concept so that we are spared the—current—view of marriage as an institute of labor law!"

"even worse"—because it involves using oneself as a mere means of the satisfaction of animal drives. Kant's solution to the problem of the self-degradation that results from subordinating oneself to another by making him or her the object of one's appetite is mutual degradation; "the miracle of transforming the thing into a person"²⁰⁶ entails making oneself and one's member someone else's "property," and thus into "community property."²⁰⁷ Implausible as a sublation of a moral dilemma, Kant's practical imperative—"I would not want to be a member of any community that would not want to possess my member"²⁰⁸—lacked even the virtue of gender neutrality: he specified the "relationship of community occupancy [Inhabung in Gemeinschaft] . . . as an unequal society (whose members are subordinated to (not coordinated with) each other) since . . . the wife belongs to the husband."²⁰⁹

This unorthodox conception of marriage was a product of Kant's old age. Kant's more specific views on women, which he promoted during the entire last third of the eighteenth century, were forged in a period genre that developed a catalog of sex-polarized psychological characteristics thought to correspond to physiological ones. Unlike earlier patriarchal discourse on gender contrasts, which

206. G. Solari, *La dottrina kantiana del matrimonio*, 31 RIVISTA DI FILOSOFIA 1, 21 (1940).

207. Kant, 19 KANT'S GESAMMELTE SCHRIFTEN, Reflection No. 7879, *supra* note 204, at 543; KANT, *supra* note 195, at 558. In an alternative formulation, Kant asserted that by virtue of such mutuality, "I have reoccupied myself. . ." Immanuel Kant, *Moralphilosophie Collins*, in 27: 1 KANT'S GESAMMELTE WERKE 237, 388 (1974 [1784-85]). For an (unconvincing) explanation of Kant's resolution of the antinomy of giving oneself away as a thing without becoming a thing, see ADAM HORN, IMMANUEL KANTS ETHISCH-RECHTLICHE EHEAUFFASSUNG: EINE RECHTFERTIGUNG SEINES EHERECHTS 19-20, 26 (1936).

208. This modern reformulation appears to conform to Kant's practical imperative: "Act so that you use humanity, both in your person and in the person of every other, always at the same time as end, never merely as means." IMMANUEL KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN, in 7 WERKE 61 (1956 [1785]).

209. Kant, 20 KANT'S GESAMMELTE SCHRIFTEN, *supra* note 203, at 457. Christian Wolff had at least recognized in principle that with regard to those matters that the wife understood better than the husband, he was obligated to follow her advice. WOLFF, *supra* note 203, § 58, at 43. Such considerations make it difficult to accept the claim that precisely with regard to marriage, "Kant's critical humanistic philosophy, based on empiricism and reason," should be contrasted with the "rational, dogmatic, in part still theologically influenced enlightenment." HORN, *supra* note 207, at 45. Kant's approach perversely suggested the permissibility of divorce: Since one could not be prevented from "throwing oneself away with regard to sexual intercourse," one therefore had the right to "tear up such pactum and is not bound" by it. Kant, 19 KANT'S GESAMMELTE SCHRIFTEN No. 7866, at 540. One recent commentator actually cites Kant's view as a needed corrective of feminism: sex is "an instance of general inhumanity of man (i.e. human beings in general) towards man." HOWARD WILLIAMS, KANT'S POLITICAL PHILOSOPHY 118 (1983).

tended to be rooted in discussions of estates and social positions and the virtues appropriate to them, the new genre shifted the locus of contrasting sex characteristics to within men and women. This interiorization and universalization was associated with the transition from the large work-centered family to the bourgeois family, in which monetized work was transferred outside of the household together with the husband.²¹⁰

Kant devoted eighteen pages of an early tract on beauty (women) and the sublime (men) to such an ex cathedra cataloging suffused with the most blatant normative sex-role stereotypes.²¹¹ At one of the high points, he observed that a woman whose head is full of Greek or who discusses mechanics, could just as well wear a beard because it would perhaps more recognizably express the mien of profundity for which she is competing.²¹² His later marginal *Comments* to this work at times read like fortune-cookie aphorisms. Several representative examples will suffice: "A pregnant woman is obviously more useful but not so beautiful. Virginity is useless but pleasant." "The woman seems to lose more than the man because in her the beautiful features cease in men however the noble ones remain. The old woman seems to be worth nothing."²¹³ In response to Hume's belief that a woman who knew nothing of Greek or Roman history could not entertain intelligent company, Kant pointed out that Hume had neglected the fact that women were not there to serve men in sustaining reflection, but rather to recover from it.²¹⁴

A certain continuity marked Kant's views throughout his career. Three decades later he classified women by nature with servants, employees, and all others who lacked the income-generating property that alone conferred civil autonomy (*bürgerliche Selbständigkeit*); Kant therefore excluded all of them from active citizenship.²¹⁵ The ostensibly empirical remarks in his late work on

210. See Karin Hausen, *Die Polarisierung der "Geschlechtscharaktere"—Eine Spiegelung der Dissoziation von Erwerbs- und Familienleben*, in *SOZIALGESCHICHTE DER FAMILIE IN DER NEUZEIT* EUROPAS 363, 367-75 (Werner Conze ed., 1976).

211. For an argument that this work represented a (successful) effort to pay tribute to high society in Königsberg for having admitted him to it and was merely a compromise compilation of views of great currency, see JAUCH, *supra* note 194, at 112-14.

212. IMMANUEL KANT, *BEOBACHTUNGEN ÜBER DAS GEFÜHL DES SCHÖNEN UND ERHABENEN*, in 2 IMMANUEL KANT, *WERKE* 821, 852 (1960 [1764]).

213. IMMANUEL KANT, *BEMERKUNGEN IN DEN "BEOBACHTUNGEN ÜBER DAS GEFÜHL DES SCHÖNEN UND ERHABENEN"* 97, 94 (Marie Rischmüller ed., 1991 [1760s]). The editor of this new edition prefers to characterize them as associations; *id.* at xi-xv.

214. Immanuel Kant, *Bemerkungen zu den Beobachtungen über das Gefühl des Schönen und Erhabenen*, in 20 KANT'S GESAMMELTE SCHRIFTEN, *supra* note 202, at 183.

215. KANT, *supra* note 195, at 432-33; Immanuel Kant, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*, in 11 IMMANUEL KANT, *WERKE* 127, 151 (1957 [1793]).

philosophical anthropology, which formed a new phase in the evolution of the aforementioned genre of gender discourse, are so densely packed with unmistakable place- and time-bound prejudices as to read embarrassingly like an Enlightenment-era Ann Landers column.²¹⁶ Thus whereas the man loves domestic peace, the woman does not shy away from domestic war, which she conducts with her naturally loquacious and eloquent tongue with which she disarms the man.²¹⁷ Kant also knew that a wife develops contempt and even hatred for a husband who does not beat her for flirting with other men because it shows that he is willing to abandon her to others "to gnaw on the same bone."²¹⁸ Because nature wants the woman to be sought, her taste in men's beauty (as contradistinguished from their strength to protect women) cannot be so fastidious—otherwise she would have to be the suitor and the man the rejector, which would lower the value of her sex in his eyes.²¹⁹ Finally, in an anthropology lecture a few years earlier, Kant shared this insight with his (male) students: "All women are inclined to stinginess, and if they give something, then it is either something that they do not at all need or that does not cost them anything. Here, too, one must admire the excellent arrangement of nature, which has intended that that part of the human race that earns nothing not be generous."²²⁰

Fichte carried on in the same vein where Kant left off.²²¹ In his book on natural law written contemporaneously with Kant's late works, Fichte, too, was fixated on the gender-specific natural polar

216. Kant's view of the stereotypical gender-specific polar distribution of intellectual, moral, and emotional characteristics appears to have been strongly influenced by JEAN-JACQUES ROUSSEAU, *ÉMILE OU DE L'ÉDUCATION* (1762). Rousseau derived the father's primacy in the family both from the woman's periodic inaction caused by menstruation and the husband's need to inspect his wife's conduct in order to insure that the children whom he is forced to acknowledge and to feed are his; having nothing similar to fear, the wife did not have the same right. Jean Jacques Rousseau, *De l'Économie politique*, in 2 THE POLITICAL WRITINGS OF JEAN JACQUES ROUSSEAU 237, 239 (C. Vaughan ed., 1962 [1755]). For a much more subtle discussion of this point, see DAVID HUME, A TREATISE OF HUMAN NATURE 570-73 (1967 [1740]).

217. IMMANUEL KANT, ANTHROPOLOGIE IN PRAGMATISCHER HINSICHT, in 12 IMMANUEL KANT, *WERKE* at 649 (1956 [1798]).

218. *Id.* at 650 n.*.

219. *Id.* at 652-53. See also Dr. Chesmar, *Der Entwurf des bürgerlichen Gesetzbuches für das Großherzogtum Hessen*, RHEINISCHE ZEITUNG, No. 205, July 24, 1842, Supp., at 1, col. 1. This argument, socio-biologically clothed and without reference to Kant, runs throughout Posner's *Sex and Reason*.

220. Immanuel Kant, *Anthropologia*, in DIE PHILOSOPHISCHEN HAUPTVORLESUNGEN IMMANUEL KANTS 339-40 (Arnold Kowalewski ed., 1965 [1791]).

221. For a very high decibel-level but low-yield account of Fichte's views on women, see HANNELORE SCHRÖDER, DIE RECHTLOSIGKEIT DER FRAU IM RECHTSSTAAT: DARGE-STELLT AM ALLGEMEINEN PREUSISCHEN LANDRECHT, AM BÜRGERLICHEN GESETZBUCH UND AN J.G. FICHTE'S GRUNDLAGE DES NATURRECHTS 83-190 (1979).

distribution of activity and passivity. Because the character of reason was absolute self-activity, it was not against reason that the first sex seeks the satisfaction of its sexual instinct, "since it can be satisfied by activity: but it is simply against reason that the second resolve on the satisfaction of its as a purpose because it would then be making a mere suffering [Leiden] into a purpose."²²² Whereas men could admit to having a sexual instinct without forfeiting their dignity, women could not; for the same reason, a man could court a woman but never a woman a man. She would be depreciating herself because a woman's rejection of a man means merely that she refuses to subject herself to him—which is tolerable. But it would be intolerable for a woman to be rejected by a man because it would be tantamount to telling her that he does not want to accept the subjection that has already occurred. Fichte mocked some women's claims of equal entitlement to seek a spouse by challenging them to try it: "This is just the same as if it were examined whether people did not have every much as right to fly as birds. But let us rather drop the matter of right until someone really does fly."²²³

In light of his view that no "unspoiled" woman is activated by a sexual instinct, but only by love, that is, "her natural instinct to satisfy a man,"²²⁴ it was only consistent for Fichte to conceptualize marriage as a hierarchical relationship: "In the concept of marriage lies the most unlimited subordination of the woman to the will of the man; not for a juridical, but rather for a moral reason. She must subordinate herself for the sake of her own honor. —The woman does not belong to herself, but to the man."²²⁵ By the same token, since Fichte imagined people as entering into marriage by their own free will, he upheld (the ALR's provision for) divorce by mutual consent where the woman's love and the man's magnanimity were destroyed.²²⁶

In his *Philosophy of Right* Hegel clearly articulated in the 1820s the transition from the contract-based individualistic will theory of marriage to a moral-institutional conception. Characterizing marriage as an ethical (*sittlich*)²²⁷ relationship, Hegel

222. JOHANN FICHTE, GRUNDLAGE DES NATURRECHTS, in 3:2:1 JOHANN GOTTLÖB FICHTE'S SÄMMTLICHE WERKE 306-07 (J. Fichte ed., 1845 [1796]).

223. *Id.* at 309. This tradition of show-stopping peremptory dismissal of women found its counterpart in America's greatest judge: "I who believe in force (mitigated by politeness) have no trouble—and if I were sincere and were asked certain *whys* by a woman should reply, 'Because Ma'am I am the bull.'" Letter from Holmes to Laski (Mar. 7, 1928), in 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935, at 1035 (1953).

224. FICHTE, *supra* note 222, at 311.

225. *Id.* at 325.

226. *Id.* at 336-37.

227. As used by Hegel, *Sittlichkeit* "refers to moral obligations I have to an ongoing

rejected three one-sided views that had dominated the Enlightenment: (1) the natural-law emphasis on the physical, in particular sexual, aspect; (2) Kant's conceptualization of marriage as a civil contract, which degraded it as a form of mutual use; and (3) the notion of marriage as exclusively a love relationship, which was incompatible with *Sittlichkeit* because of its subjectivity and contingency. For Hegel, then, marriage was "lawfully moral love [rechtlich sittliche Liebe]"²²⁸ in which the civil-contractual aspect was subordinated to the religious aspect: marriage as a "divine, substantial union is something elevated above my convenience and my arbitrary will."²²⁹ The objective aspect of marriage derived from the agreement of the partners to give up their natural and individual personalities in order to create a new personal unity in which self-limitation and self-consciousness liberated them.²³⁰ In language that Marx adopted virtually verbatim in his attack on Hugo, Hegel saw the *sittlich* aspect of marriage in the spouses' consciousness of their love, confidence, and commonality; as a result, the natural instinct, which was destined to be extinguished in its satisfaction, was diminished, and the "spiritual bond in its right as the substantial aspect" as elevated above the contingencies of the passions was set off as indissoluble.²³¹ It is this spiritual coalescence that sublated the contractual standpoint.²³² Despite this new focus, which made marriage *an sich* indissoluble, Hegel was aware that because marriages could not entirely eliminate the element of sentience (*Empfindung*), they were potentially dissoluble, although he urged the state to vindicate the right of *Sittlichkeit* over convenience (*Belieben*) by making the possibility of dissolution more difficult.²³³ Finally, for Hegel marriage formed the substantial basis of the relation of the state to the individual because isolated individuals were too unreliable and vacillating.

community of which I am part," whereas *Moralität* is "an abstract formal notion of obligation" holding of people as universal rational wills. In Hegel's doctrine, because morality is fulfilled in a community, *Sittlichkeit* transcends *Moralität*. CHARLES TAYLOR, *HEGEL* 376-77 (1977 [1975]).

228. HEGEL, *supra* note 151, § 161 Zusatz, at 310.

229. GEORG W.F. HEGEL, *PHILOSOPHIE DES RECHTS: DIE VORLESUNG VON 1819-1820 IN EINER NACHSCHRIFT* 133 (Dieter Henrich ed., 1983).

230. HEGEL, *supra* note 151, § 162, at 310-11.

231. *Id.* § 163, at 313.

232. "Marriage . . . is precisely this, to take as its point of departure the contract standpoint of the autonomous personality in its individuality in order to sublate it." *Id.* § 163 at 313.

233. *Id.* § 163 Zusatz, at 314-15. In his lectures on the phenomenology of nature and spirit, Hegel was much more tentative in this regard, even mentioning depopulation as a consideration that legislation had to take into account in regulating divorce. GEORG W.F. HEGEL, *JENAER REALPHILOSOPHIE* 227-29 (1967). In his 1819/20 lectures he conceded that in the case of "the total alienation of feelings . . . a separation must be able to take place." HEGEL, *supra* note 229, at 141.

Moreover monogamy was "one of the absolute principles on which the *Sittlichkeit* of a community rests. . . ." ²³⁴

Although Hegel thus appears to have moved beyond the limitations of both the natural-law and Kantian conceptions of marriage, his romantic-dialectic view was expressly freighted with the same stereotyped gender inequalities that marked the former pair. Hegel acknowledged that the man, on account of his greater autonomy outside of the relationship and in particular of his field of *sittlich* activity in the state, was more indifferent to the woman's character; the "girl," on the other hand, found her *sittlich* determination essentially only within the marriage. ²³⁵ Much more so than Kant or Fichte, whose remarks on women at their best sounded like drawing room chatter, Hegel sought to confer philosophical dignity on men's contempt for women by integrating those prejudices into his general conceptual framework. Thus the mental and intellectual aspects falling on the male side of the characterological ledger enabled men to lead dual lives in personal autonomy and free universality and objectivity in the state, science, and art and in struggle and labor with the external world; ²³⁶ women, in contrast, remained embedded in concrete individuality and feeling, which limited them to the sphere of merely subjective *Sittlichkeit* within the family. Bereft of the universal and ideal, women, while capable of being educated, "are not made" for the higher sciences or philosophy. "Everything great that has been produced in the world, all epochs in the external as well as internal world history, have been produced essentially by men. Of no woman can it be said on the whole that she was epoch-making in world history." ²³⁷

It was precisely the failure of philosophers such as Kant to dis-

234. HEGEL, *supra* note 229, at 141; HEGEL, § 167, *supra* note 151, at 320.

235. HEGEL, *supra* note 151, § 162, at 312 (Hegel's marginal comments), § 164 Zusatz, at 317-18. At the age of twenty-five, Jenny von Westphalen, who was being courted by Marx, appeared to be as much a Hegelian as he: "The girl's love is different than the man's, and it must be different. The girl can of course give the man nothing else but love and herself and her person just as she is completely undivided and eternally. In customary relations the girl must also find her complete satisfaction in the man's love. . . ." Jenny von Westphalen to Marx (ca. 1839-1840), in 3:1 MARX [&] ENGELS GESAMTAUSGABE, *supra* note 5, at 337.

236. Marx's wife remained a Hegelian in later life, using almost precisely this language to explain why women had a harder time: "The man, he strengthens himself in the struggle with the external world, invigorated in the face of enemies . . . , we sit at home and darn socks." Letter from Jenny Marx to Wilhelm Liebknecht (May 26, 1872), in 33 MEW, *supra* note 6, at 702.

237. HEGEL, *supra* note 151, § 166 and Zusatz, at 318-19; HEGEL, PHILOSOPHIE DES RECHTS, *supra* note 229, at 137, 138; see also GEORG WILHELM FRIEDRICH HEGEL, PHÄNOMENOLOGIE DES GEISTES 326-28, 340 (1952 [1807]) [hereinafter HEGEL, PHÄNOMENOLOGIE. Cf. JOHN STUART MILL, THE SUBJECTION OF WOMEN, in THREE ESSAYS 425, 496 (1952 [1869]) ("A woman seldom runs wild after an abstraction.").

tinguish between the merely contingent-conventional and the dictates of reason that made them vulnerable to Hugo's historicist criticisms of apriorist legal philosophy. Against the background of this programmatic and systemic misogyny at the loftiest peaks of Western philosophical reason and intellect, the mature Marx's episodic references to women in *Capital* can best be characterized as egalitarian.

E. *Marx's Critique of Hugo*

The immediate occasion for Marx's polemic against Hugo and the Historical School of Law was King Friedrich Wilhelm IV's appointment of Savigny as Prussian Minister for Legislation on February 28, 1842 and the king's order of the same day demanding the reform of the marriage provisions of the ALR so as to remove those principles contradicting Christian doctrine.²³⁸ Marx's first reference to his piece on the Historical School of Law came in a letter two months later to Arnold Ruge, in which Marx wrote that he was almost done with four articles, which he would send Ruge for a publication (*Anekdoten zur neuesten deutschen Philosophie und Publicistik*) edited by the latter. In addition to *The Philosophical Manifesto of the Historical School of Law*, the other three were entitled *On Religious Art*, *On the Romantics*, and *The Positive Philosophers*. All, Marx added, hung together substantively.²³⁹ Only

238. See *supra* § II.C; VON TREITSCHKE, *supra* note 190, at 155-57; 1:1:1 MARX [&] ENGELS, HISTORISCH-KRITISCHE GESAMTAUSGABE, *supra* note 97, at 1. Mehring may have been the source of the erroneous account that the occasion was the golden jubilee of Hugo's Promotion on May 10, 1842. 1 GESAMMELTE SCHRIFTEN VON KARL MARX UND FRIEDRICH ENGELS 1841 BIS 1850: VON MÄRZ 1841 BIS MÄRZ 1844, in AUS DEM LITERARISCHEN NACHLASS VON KARL MARX, FRIEDRICH ENGELS UND FERDINAND LASSALLE 184, 326 (Franz Mehring ed., 1902). That celebration had in fact taken place on May 10, 1838 (which was also the day on which Marx's father died). As examples of the incorrect account, see AUGUSTE CORNU, 1 KARL MARX AND FRIEDRICH ENGELS: LEBEN UND WERK: 1818-1844, at 280-81 (1954); HORST SCHRÖDER, FRIEDRICH KARL VON SAVIGNY: GESCHICHTE UND RECHTSDENKEN BEIM ÜBERGANG VOM FEUDALISMUS ZUM KAPITALISMUS IN DEUTSCHLAND 223 (1984). MECHTHILD MERFELD, DIE EMANZIPATION DER FRAU IN DER SOZIALISTISCHEN THEORIE UND PRAXIS 31 (1972), mistook Marx's article for a book review of a book by Hugo entitled *Das philosophische Manifest der historischen Rechtsschule*. DICK HOWARD, THE DEVELOPMENT OF THE MARXIAN DIALECTIC 30 (1972), mentions Savigny's appointment but not the divorce draft law as the occasion for Marx's article. LOUIS DUPRÉ, THE PHILOSOPHICAL FOUNDATIONS OF MARXISM 68 (1966), further confused matters by referring to "Leo Hugo," probably conflating Hugo and Heinrich Leo, another of Marx's targets. Marx, 1:1 MARX [&] ENGELS, GESAMTAUSGABE, *supra* note 116, at 198. LEONARD WESSELL, KARL MARX, ROMANTIC IRONY, AND THE PROLETARIAT: THE MYTHOPOETIC ORIGINS OF MARXISM 158 (1979), undertakes an analysis knowing only that Marx attacked "a certain Gustav Hugo."

239. Letter from Marx to Arnold Ruge (Apr. 27, 1842), in 27 MEW, *supra* note 12, at 402.

the article on the Historical School of Law was ever published (or perhaps written)—but not in the *Anekdoten*. But the focus of an article that Marx did publish there the following year on Prussian censorship shows that at the heart of his political-intellectual concerns at the time were the ideological foundations of Friedrich Wilhelm IV's Christian-Germanic restoration.²⁴⁰ It was apparently the public discussion of the first results of Savigny's secret divorce law draft in June and July of 1842 that caused Marx to write the article that summer based on the aforementioned preliminary studies.²⁴¹

Marx published his article in the *Rheinische Zeitung*, to which he began contributing in May and of which he became editor-in-chief on October 15, 1842. The newspaper, the full title of which was the *Rhenish Newspaper for Politics, Trade, and Industry*, had just begun publication on January 1. Later characterized by Engels as the beginning of the modern newspaper press in Germany,²⁴² the paper was a joint effort between radical Young Hegelians and "representatives of the prosperous Rhenish bourgeoisie . . . in the attempt to combine speculative philosophy and practical economic interests into a single liberal organ of the Rhenish middle classes."²⁴³ Marx's piece, which was published anonymously in the supplement to the *Rheinische Zeitung* on August 9, 1842, only five months after Savigny's appointment, was a transparently oblique attack on Savigny as the leader of the Historical School of Law in order to discredit him in his role as Code revisor. The preceding discussion of the appropriateness of classifying Hugo as a member, let alone the founder, of what became known as the Historical School of Law raises a question as to the intellectual and political fairness of Marx's polemical use of Hugo as a stand-in for Savigny—especially since as late as 1840 each criticized the other's view of marriage.²⁴⁴

240. Karl Marx, *Bemerkungen über die neueste preußische Zensurinstruktion*, in 1:1 MARX [&] ENGELS, GESAMTAUSGABE, *supra* note 116, at 97 (1843); 1:1:1 MARX [&] ENGELS, HISTORISCH-KRITISCHE GESAMTAUSGABE, *supra* note 97, at xlix.

241. 1:1 MARX [&] ENGELS, GESAMTAUSGABE, *supra* note 116, at 1016.

242. Friedrich Engels, *Revolution and Counterrevolution in Germany*, in 11 KARL MARX & FREDERICK ENGELS, COLLECTED WORKS 18 (1978 [1851]).

243. LEONARD KRIEGER, THE GERMAN IDEA OF FREEDOM: HISTORY OF A POLITICAL TRADITION 285 (1972 [1957]). See generally KÖNIG, *supra* note 190, at 1-27. On Marx and the *Rheinische Zeitung*, see WILHELM KLUTENTRETER, DIE RHEINISCHE ZEITUNG VON 1842/43 IN DER POLITISCHEN UND GEISTIGEN BEWEGUNG DES VORMÄRZ 68 (as 10:1 DORTMUNDER BEITRÄGE ZUR ZEITUNGSFORSCHUNG, 1966). On Marx's association with the newspaper, see FRANZ MEHRING, KARL MARX: GESCHICHTE SEINES LEBENS 42-61 (1979 [1918]). ISAIAH BERLIN, KARL MARX: HIS LIFE AND ENVIRONMENT 72-74 (2d ed. 1963 [1939]), provides a factually erroneous account of Marx and the *Rheinische Zeitung*.

244. 1 FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 346 n.a. (1840); Hugo, review of SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS, in 1840

That question may, however, be beside the point if Marx in fact intended his attack as methodological parody.²⁴⁵ He suggested just such an interpretation by observing at the outset that by taking its fondness for returning to the literary sources to the extreme, the Historical School "expects the navigator to sail not on the stream, but on its source"; consequently, it could have no objection to Marx's returning to its sources—Hugo's *Textbook on Natural Law*. Marx preferred this approach for another (probably disingenuous) reason: because Hugo created the philosophy before the School developed, there was none to be found in the School proper.²⁴⁶ More plausibly, Marx shunned a direct confrontation with the new minister of justice—and his former law professor—for general political reasons and in order to avoid offending the censor.²⁴⁷

In an important sense, then, Marx was using a rhetorical ploy: by turning Savigny's own historical-hermeneutical method against him, Marx was able to show what absurd conclusions disembodied intellectual history could generate. Without disavowing their own foundations, Savigny and his followers would then be unable to repudiate the results of Marx's polemic. In order to explain the blatant incongruity between Savigny, the romantic organicist, and the "frivolous" "skepticism" of Hugo, the "roué," which made it seem implausible that Savigny actually shared Hugo's specific views, Marx asserted that "it truly takes only little critique" to see that all the moderns had done was gussy up Hugo's raw "animalistic" as "organic." Whether it in fact took little or much critique, Marx truly offered only little if any critique; yet whether Hugo's denial of the existence of reason in *sittlich*-legal institutions such as marriage was synonymous with the moderns' appeal to a higher positive reason, Marx at least articulated—even if he did not substantiate—the credible claim that "*Hugo's Natural Law* [w]as the *German theory* of the French ancien régime," which suited the restorationist legislative goals of Friedrich William IV and Savigny.²⁴⁸ This argument

GÖTTINGISCHE GELEHRTE ANZEIGEN 1011, 1022-26. In another unmistakable reference to Savigny, Marx asserted that "the most famous historical jurist" had recently celebrated Hugo as the creator of the Historical School. Marx, *supra* note 116, at 192. As already noted, Savigny's praise had in fact been faint.

245. Such parody could have been modelled after Bruno Bauer's contemporaneous anonymous left-Hegelian critique masquerading as pietism. DIE POSAUNE DES JÜNGSTEN GERICHTS ÜBER HEGEL DEN ATHEISTEN UND ANTICHRISTEN: EIN ULTIMATUM (1841).

246. Marx, *Das philosophische Manifest*, *supra* note 116, at 191.

247. As a law student in Berlin, Marx was registered for Savigny's course on the pandects in 1836 and studied his works closely. 1 GESAMMELTE SCHRIFTEN VON KARL MARX UND FRIEDRICH ENGELS 1841 BIS 1850, *supra* note 238, at 11; Letter from Marx to his father, Heinrich Marx (Nov. 10, 1837), in MEW, Supp., pt. 1, *supra* note 20, at 3, 5, 9.

248. Marx, *supra* note 116, at 191, 194, 197, 198. Mehring, too, asserted that in order to last in the age of classical literature and philosophy, the Historical School of Law had

sufficed to confer intellectual and political integrity on Marx's first foray into journalistic philosophy.²⁴⁹

That, despite these methodological subtleties, *The Philosophical Manifesto*, which Sidney Hook in his Marxist period considered "one of the most penetrating and suggestive criticisms of the methodological presuppositions of the historical school of law,"²⁵⁰ was also a quick-and-dirty politically expedient polemic, suggests that the piece was a harbinger of Marx's intellectual adventures. To begin with, although Hugo was obviously an easy object of ridicule, Marx made it even easier for himself by studiously omitting any reference to the many views expressed by Hugo that not only did not fit Savigny's legislative profile, but in some important respects transcended even Marx's own radical-democratic position in 1842. This approach was facilitated by Marx's practice of convicting Hugo out of his own mouth through extensive extracts unaccompanied by any substantive commentary by Marx. Both the selectivity and the fact that the quotations were inadequately integrated into Marx's introductory programmatic remarks meant that they failed to support the conclusion that Hugo's successors lacked "the vocation to be the legislator of our time."²⁵¹

How Hugo reacted to—or whether he was even aware of—the pillorying to which Marx subjected him is unknown.²⁵² Indeed, it is even unclear whether Marx knew that Hugo was still alive. After all, by 1842 Hugo had been so overshadowed by Savigny and the Historical School of Law that a book that appeared that year prematurely referred to him as the "already deceased law teacher."²⁵³

Marx began his general analysis of Hugo by permitting himself the ironic license of attributing to Hugo a misinterpretation of Kant according to which it follows from our inability to know the true that we let whatever is untrue pass for completely valid wherever we find it. Marx claimed that this (non-existing) principle underlay Hugo's method of seeking to prove not that the positive is rational, but

to camouflage the "naive brutality" of its founder, Hugo. 1 GESAMMELTE SCHRIFTEN VON KARL MARX AND FRIEDRICH ENGELS 1841 BIS 1850, *supra* note 238, at 326-27.

249. A year and a half later Marx characterized the Historical School of Law as one that "legitimizes the baseness of today by the baseness of yesterday." Karl Marx, *Zur Kritik der Hegelschen Rechtsphilosophie: Einleitung*, in 1 MEW, *supra* note 175, at 378, 380.

250. HOOK, *supra* note 121, at 142.

251. Marx, *supra* note 116, at 197. This phrase was of course a reference to Savigny's anti-codification book of 1814.

252. In the last year of his life Hugo had heard of a "very unfriendly description" in the radical *Hallische Jahrbücher* or *Deutsche Jahrbücher*. 3 [GUSTAV] HUGO, BEYTRÄGE ZUR KENNNTNIS CIVILISTISCHER BÜCHER SEIT 1788: LETZTER BEYTRAG 30 (1844).

253. WILHELM EBEL, GUSTAV HUGO PROFESSOR IN GÖTTINGEN 33 (1964) (without stating source).

rather that it is not rational. Furthermore, if the point was to prove that the positive is valid because it is positive, then it was necessary to prove that the positive is valid not because it is rational—and what better way to achieve that goal than by showing that the irrational is positive and the positive not rational?²⁵⁴

The logic here is not compelling. If all Hugo was trying to do was to establish the priority and supremacy of the positive, it was a matter of indifference whether the positive was rational, irrational, or arational. Hugo may in fact have been the absolutist toady Marx (and others) cast him as, but whatever service he rendered the ruling powers by profaning the rationality of sacred institutions and then honoring their empirical historicity²⁵⁵ occurred not by virtue of his sophistication as a philosopher of law. Unlike Kant,²⁵⁶ he offered no subtle moral-philosophical grounding for compulsory acquiescence in unreasonable laws ("submit to that which is positive within your four walls").²⁵⁷ Although Hugo may have been untrue to his master Kant by launching an empirical attack on the rational basis of law, and although such an undertaking may have overlapped with the later romantic-organicist current of the Historical School, merely mocking Hugo's "smug industriousness" in pulling it off was no substitute for a critique. An adequate critique of Hugo would have consisted in showing either that the institutions were in fact rational or that Kant's version of natural law was immune to empirical refutation.

Marx's approach appears to have been dictated by his disgust at Hugo's value-neutrality ("the skin rash is as positive as the skin").²⁵⁸ In one of his characteristic rhetorical inversions, Marx contrasted the Enlightenment's skepticism of the rationality of existing society (*Vernunft des Bestehenden*) with Hugo's skepticism of the

254. Marx, *supra* note 116, at 192.

255. *Id.* Unlike Hugo, the greatest debunker of reason and natural law, Hume, conceded: "Tho' the rules of justice be artificial, they are not arbitrary." HUME, *supra* note 216, at 484.

256. Immanuel Kant, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis* at 155-58; KANT, *supra* note 195, at 307, 437-43. On Kant's diremption between external acts, which are subject to an externally compelled legal duty in the sphere of legality, and internal sentiments (*Gesinnung*), which are subject to a self-compelled ethical duty in the sphere of morality, see KARL MARX & FRIEDRICH ENGELS, *DIE DEUTSCHE IDEOLOGIE*, in 3 MEW 176-78 (1958 [1846]); FRANZ NEUMANN, *DIE HERRSCHAFT DES GESETZES: EINE UNTERSUCHUNG ZUM VERHÄLTNIS VON POLITISCHER THEORIE UND RECHTSSYSTEM IN DER KONKURRENZGESELLSCHAFT* 167-69 (Alfons Söllner trans., 1980 [1936]); FRANZ NEUMAN, *On the Limits of Justifiable Disobedience*, in *THE DEMOCRATIC AND THE AUTHORITARIAN STATE: ESSAYS IN POLITICAL AND LEGAL THEORY* 149, 155 (1964 [1952]); BLOCH, *supra* note 155, at 85-86.

257. Marx, *supra* note 116, at 193.

258. *Id.*

existence of reason (*Bestehen der Vernunft*).²⁵⁹ Marx failed, however, to articulate and counterpose his own reason-based institutions. The most interesting example was Hugo's so-called defense of slavery, which Marx excerpted without any commentary whatsoever. The gist of it was that slavery was as good positive law as some private-law institutions; without using the talismanic class terms, Hugo contrasted the situation of a slave whose rich owner would not benefit from permitting him to starve with that of a poor person whose fellow citizens used him only as long as he was useful.²⁶⁰ At the age of twenty-four Marx apparently believed that all right-thinking people would be horrified by such irreverence; only later would this trope of the slaveholding South and its sympathizers²⁶¹ prompt Marx to discourse on the world-historical significance of the changing forms of surplus labor extraction.²⁶²

Marx appears, therefore, to have operated on the unspoken assumption that Hugo and abstract idealism differed not so much in principle as in "the specific things they declare to be good or evil."²⁶³ And surprising as it may seem, the future revolutionary chose of all things to defend marriage as an institution inspired by reason. It is precisely this strategy that demonstrates how hopelessly unmarxist Marx was at this time. Marx opened his discussion of Hugo's views on marriage—the censors' deletion of which was not visible in the *Rheinische Zeitung*—with a sarcastic remark on how Hugo found the satisfaction of the sexual instinct within marriage convenient. Marx then quoted Hugo's claim that Kant had not understood that it was not always *unsittlich* to use another person's body as a means to achieving one's own end. In light of Kant's already reified conception of marriage, which drained it of any recognizably human content, Hugo's elimination of Kant's implausible philosophical defense of its rump claim to morality left marriage an institution of unrelieved oppression of women programmatically satisfying Andrea Dworkin's criteria of sexual subordination.²⁶⁴ As against this radicalized sexist animality, Marx's romantic glorification of monogamy, which so

259. *Id.* A half-century later, Engels, as an aid in identifying Marx's anonymous articles in the *Rheinische Zeitung*, instructed an editor to look out for Marx's style—"short, antithetically pointed sentences." Letter from Engels to Richard Fischer (Apr. 18, 1895), in 39 MEW 471 (1968).

260. Marx, *supra* note 116, at 194.

261. See, e.g., GEORGE FITZHUGH, *CANNIBALS ALL!*, reprinted in ANTE-BELLUM 97, 125-26 (Harvey Wish ed., 1960 [1857]).

262. 1 MARX, *DAS KAPITAL*, in 23 MEW, *supra* note 51, at 231, 270 n.90. On Marx's attitude toward authors like Fitzhugh, see EUGENE GENOVESE, *THE WORLD THE SLAVEHOLDERS MADE* 174-84 (1971 [1969]).

263. See HOOK, *supra* note 121, at 144.

264. Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, Equality*, 8 HARV. WOMEN'S L.J. 1, 15-16 (1985) (hierarchy, objectification, submission, and violence).

amused MacKinnon, takes on additional contextual significance: "[T]he sanctification of the sexual instinct through *exclusivity*, the subduing of the instinct by laws, the *sittlich beauty* which idealizes the dictate of nature into an aspect of spiritual union—the *spiritual essence* of marriage—that is precisely what for Mr. Hugo is *dubious* about marriage."²⁶⁵

An obvious question that Marx's point raises is why, given his advocacy of an anti-contractualist, spiritualist conception of marriage that coincided with the model underlying the restorationist divorce law draft, the censor would have wanted to cut this section? This question becomes even more difficult to answer given Marx's decision to shore up his own pedestalization of monogamy with a quotation from Benjamin Constant, whom he happened to be reading at the time.²⁶⁶ Constant, a French politician, philosopher, novelist, and well-known lover of Madame de Staël, added a distinctly sexist-mystical dimension to Marx's gender-neutral romanticism:

It is in renouncing for a single man this mysterious reserve, whose divine rule is imprinted in her heart, that the woman dedicates herself to this man, for whom she suspends, in a momentary abandon, this modesty, which never leaves her; for whom alone she draws aside the veils which are otherwise her sanctuary and adornment. Hence the intimate confidence in her husband, result of an exclusive relation, which can exist only between her and him without her immediately feeling sullied; hence in this husband the gratitude for a sacrifice and this mixture of desire and respect for a being who, even while sharing his pleasures, still seems only to yield to him; hence everything that is orderly in our social order.²⁶⁷

That Marx quoted Constant, one of Europe's best known "sentimental libertines,"²⁶⁸ as an authority for the idealization of prudery raises a question as to whether *The Philosophical Manifesto* was intended as satire; in the alternative, perhaps some compassionate censor did Marx a favor by suppressing these passages. In order to place Marx's effusive enthusiasm for Constant's exaltation

265. Marx, *supra* note 116, at 195.

266. In 1842 Marx made copious excerpts from Constant's book surrounding but not including the passage Marx cited in his attack on Hugo. Karl Marx, *Exzerpte aus Benjamin Constant, De la religion*, in 4:1 MARX [&] ENGELS, GESAMTAUSGABE (MEGA) 347 (1976). A half-century earlier Constant had contested Kant's claim that one has a duty truthfully to answer a murderer's question as to the whereabouts of one's friend whom he was pursuing. Immanuel Kant, *Über ein vermeintes Recht aus Menschenliebe zu lügen*, in 8 IMMANUEL KANT, WERKE, *supra* note 195, at 637. STEPHEN HOLMES, BENJAMIN CONSTANT AND THE MAKING OF MODERN LIBERALISM 106-09 (1984).

267. Marx, *supra* note 116, at 195-96; Marx was quoting from 1 BENJAMIN CONSTANT, DE LA RELIGION, CONSIDÉRÉE DANS SA SOURCE, SES FORMES, ET SES DÉVELOPPEMENTS 172 (1830).

268. ARNOLD DE KERCHOVE, BENJAMIN CONSTANT OU LE LIBERTIN SENTIMENTAL (1950).

of female chastity in the service of subjugation—which he even embellished by misquoting²⁶⁹—in the context of Marx's own political-intellectual development, it is noteworthy that Constant was well known in Germany at that time as a staunch opponent of state socioeconomic intervention on the ground that unshackling the moral and creative energies of bourgeois individuals was the greatest source of social progress. Indeed, Constant's advocacy of a night-watchman state served German capitalists in the 1830s and 1840s as intellectual justification of their opposition to labor protective legislation.²⁷⁰ And the self-same Marx at that time articulated the following distinctly anti-Marxist view on law: "Laws are . . . the positive, shining, universal norms in which freedom has gained an impersonal, theoretical existence independent of the arbitrary will of the individual. A statute book is the bible of freedom of a people."²⁷¹ This conception of the law may have borne the same relationship to Marx's later state- and class-power oriented views of social legislation²⁷² as did his early view of marriage to whatever his mature view may have been.

Although Marx in his "pre-socialist period"²⁷³ and pre-Marxist writings obviously still clung to a number of conventional notions concerning women and marriage, his theoretical views on marriage underwent rapid change in the direction of a historical approach.²⁷⁴ In the same vein, two years later Marx shifted his focus to the "masterful characterization of marriage" by another Frenchman, the utopian socialist Fourier. In particular Marx cited Fourier's (objectively anti-Kantian) discussion of the commodification of prospective wives and of the marriage trade as one in which two prostitutions equalled a virtue. Marx emphasized that for Fourier female

269. Marx transformed (and italicized) Constant's "organisation sociale" into "ordre sociale" and rearranged the sentence. 1 CONSTANT, *DE LA RELIGION*, *supra* note 267, at 172. Or perhaps Joseph Hansen copied the quotation incorrectly.

270. See LOTHAR GALL, BENJAMIN CONSTANT: SEINE POLITISCHE IDEENWELT UND DER DEUTSCHE VORMÄRZ 295-311 (1963); GUY DODGE, BENJAMIN CONSTANT'S PHILOSOPHY OF LIBERALISM: A STUDY IN POLITICS AND RELIGION 137-42 (1980).

271. Karl Marx, *Die Verhandlungen des 6. rheinischen Landtags, Erster Artikel: Debatten über Preßfreiheit und Publication der Landständischen Verhandlungen* in 1:1 MEGA at 121, 150 (May 12, 1842).

272. See, e.g., Marx, *Instruktionen*, *supra* note 72, at 194 (on class struggle basis of child labor legislation).

273. Letter from Engels to Fischer (Apr. 18, 1895), in 39 MEW, *supra* note 259, at 471.

274. *Ökonomisch-philosophische Manuskripte aus dem Jahre 1844*, in MEW, Supp. pt. 1, *supra* note 20, at 465, 534-35. See generally, Draper, *supra* note 29, at 85-86. But see GERHARD, *supra* note 160, at 173; MERFELD, *supra* note 75, at 31-51 (Marx's agreement on issue of marriage with those who were otherwise his political opponents can be explained only by common denominator of patriarchalism).

emancipation was the natural measure of universal emancipation.²⁷⁵

In one of the first serious appraisals of Marx's piece on Hugo, Sidney Hook noted that it "has been . . . strangely neglected by professional scholars."²⁷⁶ Not only has this gap in scholarship begun to close in the past half-century,²⁷⁷ but a controversy has evolved encompassing two polar-opposite interpretations: while Marxists have tended to see Marx's newspaper article as mere half-Hegelian-baked bourgeois ideology,²⁷⁸ a number of non-Marxists have in recent years come to regard it as embryonic mature Marxism.

Marx's rejection of Hugo's positivism for its identification of law with the positive norm has commonly been interpreted as a typical Young Hegelian period piece directed against historical value-relativism.²⁷⁹ Cornel West, for example, has recently adopted this position: "What upsets Marx about Hugo's 'historicism' is that it seems to preclude the possibility of objectivity and validity in ethics. [W]e see Marx implicitly defending objectivism, in his Hegelian way, against Hugo's extreme nihilism."²⁸⁰

Yet Marx's position in the summer of 1842 also had a non-Hegelian Kantian side to it:

Is philosophy to assume . . . different principles for each country? . . . Is there no *universal human* nature as there is a universal nature of the plants and stars? Philosophy asks what is true, not what is valid. . . ; its metaphysical truths do not know the boundaries of political geography; its political truths know too well where the "borders" begin to confuse the illusory horizon of the particular Welt- and Volksanschauung with the true

275. FRIEDRICH ENGELS & KARL MARX, *DIE HEILIGE FAMILIE, ODER KRITIK DER KRITISCHEN KRITIK*, in 2 MEW 207-08 (1957 [1845]). Soon thereafter Marx was also scorning Proudhon's petty bourgeois sentimentality concerning spousal love. Letter from Marx to Pavel Annenkow (Dec. 28, 1846), in 27 MEW, *supra* note 12, at 451, 461.

276. HOOK, *supra* note 121, at 142. Some recent lengthy intellectual biographies of Marx continue this tradition of neglect. See, e.g., JERROLD SEIGEL, *MARX'S FATE: THE SHAPE OF A LIFE* (1978); MURRAY WOLFSON, *MARX: ECONOMIST, PHILOSOPHER, JEW: STEPS IN THE DEVELOPMENT OF A DOCTRINE* (1982). In what is perhaps the most primitive analysis, PAUL KÄGI, *GENESIS DES HISTORISCHEN MATERIALISMUS* 120 (1965), limits himself to concluding that Marx did not want to know anything about the Historical School of Law.

277. See, e.g., H. ADAMS, *MARX IN HIS EARLIER WRITINGS* 59-60 (1940); DAVID MCCLELLAN, *KARL MARX: HIS LIFE AND THOUGHT* 48 (1973); MARCO DUCHIN, *IL PRIMO MARX: MOMENTI DI UN ITINERARIO INTELLETTUALE (1835-1841)* at 93-94 (1982).

278. See, e.g., LUKÁCS, *GESCHICHTE UND KLASSENBEWUßTSEIN*, *supra* note 154, at 120 n.3; CORNU, *supra* note 238, at 281-82.

279. See Pietro Ichino, *La concezione del diritto nelle opere giovanili di Marx*, *PROBLEMI DEL SOCIALISMO* (n.s.) No. 43, at 1173, 1176 (1969); Wolf Paul, *Der aktuelle Begriff marxistischer Rechtstheorie*, in *PROBLEME DER MARXISTISCHEN RECHTSTHEORIE* 72, 81 (Hubert Rottleuthner ed., 1975).

280. CORNEL WEST, *THE ETHICAL DIMENSIONS OF MARXIST THOUGHT* 25 (1991).

horizon of the human spirit.²⁸¹

Although Marx was surely in some senses a Hegelian at the time, who perceived the philosophically ideal state as the embodiment of *Sittlichkeit* and reason, rather than glorifying the existing state, he sought at every turn to show how far removed it was from that ideal. In attacking Hugo's extreme naturalism, Marx, rather than using Hegelian conceptualism, adopted the language of Spinozian and Kantian rationalism. Marx's vindication of Kant vis-à-vis Hugo was prompted by the latter's excentric claim to being a Kantian despite his having dropped the prerequisite on the validity of which Kant made his moral law—the categorical imperative—depend. Whereas Kant derived the rational necessity (*Vernunftnotwendigkeit*) of individual legal institutions from the fact that everyone, in order to exercise his reasonable will, must be externally free and possess a secured legal sphere for his action, Hugo sought to show that no legal institution was necessary in order to live in conformity with the categorical imperative.²⁸²

According to Hasso Jaeger, Marx's "unrelenting attitude" toward rationalism and positivist historicism—the latter being as absurd and abstract as the former's ethical ideal of human nature—presaged his later position that what rules the history of institutions is the totality of relations of production, an antagonistic totality owing to its universal and concrete historicity. In his critique of Hugo, Marx thus indirectly suggested the prelude to his later critique of classical political economy (Smith and Ricardo) as well as of historically oriented positivistic German economists such as Roscher who were students of Savigny: neither the former—on account of their ahistorical rationalism—nor the latter could do justice to the totality of antagonistic elements which, within the dialectical movement of history, determined the relations of production.²⁸³

Whereas Jaeger sees Hugo merely as a negative object of cri-

281. Karl Marx, *Der leitende Artikel in Nr. 179 der Kölnischen Zeitung*, in 1:1 MARX [&] ENGELS, GESAMTAUSGABE (MEGA), *supra* note 116, at 172, 179 (1842).

282. See generally 1 GESAMMELTE SCHRIFTEN VON KARL MARX AND FRIEDRICH ENGELS, *supra* note 238, at 180, 326 (editorial material by Franz Mehring); MAXIMILIEN RUBEL, KARL MARX: ESSAI DE BIOGRAPHIE INTELLECTUELLE 42-43 (1957). Alice Soon & Eugene Kamenka, *Karl Marx's Analysis of Law*, 1 INDIAN J. PHIL. 17, 28 (1959), go so far as to assert that the human reductionism of Marx's very early work, which sees "all human institutions as reflections of the human essence, robs law of any specifically legal content and makes it indistinguishable from morality." Consequently, Marx was reduced to using Kant's categorical imperative to reject any law based on privilege without being able to produce a positive legal rule or concept.

283. Hasso Jaeger, *Savigny et Marx*, 12 ARCHIVES DE PHILOSOPHIE DU DROIT 65, 73, 75-76 (1967). RICCARDO GUASTINI, MARX: DALLA FILOSOFIA DEL DIRITTO ALLA SCIENZA DELLA SOCIETÀ: IL LESSICO GIURIDICO MARXIANO (1842-1851) 60 (1974), repeats this claim with regard to vulgar political economy.

tique that provided Marx with the occasion to think through his views on the law and society, two historians of ideas have sought to revalue Hugo himself as a positive model for Marx's development. Donald Kelley has argued that "Hugo's work . . . has not been fully appreciated . . . for Marx's 'materialist' line of thought" despite the fact that as a member of the vanguard in the "deliberate campaign against old-fashioned natural law philosophy . . . [and] a pioneer in the assault not only on idealism . . . but also on the whole 'jurnaturalistic' syndrome . . . Hugo seemed opposed to the very same sort of idealist fallacy as the young Marx. . . ." Kelley concedes that the young Marx "overlooked" the strengths of the Historical School of Law, but attributes this failing to the fact that: "What really irritated Marx were the political implications of a philosophical appeal to historical experience."²⁸⁴ Kelley casts Hugo as pivotal in promoting the elaboration of the social question as it moved from property to class conflict; it was in this debate between historical realists and philosophical idealists that Marx began to forge his own position in which "[p]olitical economy was jurisprudence demystified—and demoralized (but not depoliticized)."²⁸⁵ Given the fact that Hegel explored the relationship between wealth and poverty in civil

284. Donald Kelley, *The Science of Anthropology: An Essay on the Very Old Marx*, 40 J. HIST. IDEAS 245, 249, 250 (1984). Inconsistently, Kelley's interest in Marx's relationship to Hugo lies in his attempt to show that Marx's preoccupation with anthropology in his late years suggests that Marx had begun to transcend the economic and class oriented materialist conception of history associated with "crypto-Hegelian abstraction" such as surplus value. *Id.* at 261-62. A reading of Marx's late correspondence as well as the fact that Marx was also preparing works such as the *Communist Manifesto* and *Capital* for republication (in addition to working on the second volume of *Capital*) cast considerable doubt on this interpretation; so do Marx's anthropological notebooks, in which he ridiculed Maine and Austin from a class-based position. THE ETHNOLOGICAL NOTEBOOKS OF KARL MARX 328-30 (Lawrence Krader ed., 1972). That Marx also spent his last years engrossed in such subjects as chemistry and mathematics merely underscores that he remained what he had always been—a polymathic bookworm: "I am a machine, condemned to devour them [books] and then, throw them, in a changed form, on the dunghill of history." Letter from Marx to Laura & Paul Lafargue (Apr. 11, 1868), in 43 KARL MARX & FREDERICK ENGELS, COLLECTED WORKS 10 (1988). See also Letter from Marx to Kugelman (Mar. 6, 1868), in 32 MEW, *supra* note 5, at 539 (Marx describing his ability to "choke down" masses of statistical and other "stuff" that would make others sick).

285. DONALD KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION 243-51, 263 (1990) [hereinafter THE HUMAN MEASURE]; see also Donald Kelley, *The Metaphysics of Law: An Essay on the Very Young Marx*, 83 AM. HIST. REV. 350, 360-61 (1978). Kelley erroneously characterizes Marx's anti-Hugo as "his first major published work." KELLEY, THE HUMAN MEASURE, *supra*, at 249. In fact, Marx's articles on freedom of the press, which appeared three months earlier in the *Rheinische Zeitung*, were also more important. Karl Marx, *Die Verhandlungen des 6. Rheinischen Landtags, Erster Artikel: Debatten über Preßfreiheit und Publikation der Landständischen Verhandlungen* *supra* note 271.

society from a different perspective at greater length and with much deeper philosophical insight,²⁸⁶ and given his profound and enduring impact on Marx, the significance that Kelley attributes to Marx's brief encounter with Hugo is misplaced.

Norman Levine has gone even farther, maintaining that "the roots of historical materialism are to be found in the German Historical School of Law, in the legal sociology of . . . Savigny and . . . Hugo." Marx's original contact with them was, to be sure, "not a happy one" insofar as he "attacked them as puppets of the Brandenburg monarchy. . . ." But ironically in defending Hegel's view of property as an eternal right and perceiving "the attempt by Savigny and Hugo to derive law from sociology as an assault by history and accident upon the universality of reason . . . Marx refuted a historical interpretation of law and defended an idealistic one." By offering "the historical interpretation of law and property as expressions of given societies," Hugo in effect set Marx on the road to historical materialism.²⁸⁷

In contrast, Riccardo Guastini has taken the position that Marx's Hugo critique was itself a version of apriorism with a logical structure similar to Hugo's—the only difference being that Marx made his *a priori* (reason) serve progressive political ends. If natural law jurisprudence is seen as conceiving of the law as a static system based on a criterion of validity relative to the content of the norms, which are validated by reference to a meta-normative principle, then to regard Marx's anti-Hugo as the basis of Marx's legal thought would be tantamount to classifying the mature Marx as a natural-law thinker.²⁸⁸

Marx has been accused of many things, but excessive modesty is not one of them. Why then did he never reprint this early article? Marx himself offered a hint seventeen years later in the preface to his first major political-economic work. In an autobiographical note he stated that: "My major subject was jurisprudence, which however I studied only as a subordinate discipline alongside philosophy and history. In the year 1842/43, as editor of the 'Rheinische Zeitung,' I was for the first time embarrassed by having to join in a discussion about so-called material interests." Marx then mentioned a number

286. GEORG W. F. HEGEL, *JENAER REALPHILOSOPHIE* 231-34, 257 (1967 [1805-1806]) ("Factories, manufactories found their existence precisely on the misery of a class"); HEGEL, §§ 244-45, 253, *supra* note 151, at 201-02, 205-06; GEORG LUKÁCS, *DER JUNGE HEGEL: ÜBER DIE BEZIEHUNGEN VON DIALEKTIK UND ÖKONOMIE*, in 8 GEORGE LUKÁCS, *WERKE* 398-419, 451-93 (1967 [1948]); SHLOMO AVINERI, *HEGEL'S THEORY OF THE MODERN STATE* 93-98, 145-54 (1974 [1972]).

287. Norman Levine, *The German Historical School of Law and the Origins of Historical Materialism*, 48 J. HIST. IDEAS 431, 431, 444, 445 (1987).

288. GUASTINI, MARX, *supra* note 283, at 66-67.

of these issues that were debated in the Rhenish parliament such as wood theft, the Mosel peasants, free trade, and tariffs, which "gave the first occasions for my occupation with economic questions." Significantly, Marx did not even allude to his article on the Historical School of Law or the debate on the reform of the Prussian divorce law. Instead, he admitted that in 1843, when "the good will 'to go on' frequently outweighed knowledge of the subject," he had realized that he knew too little to be able to evaluate the newest French theories of socialism and communism, and therefore used the demise of the *Rheinische Zeitung* "to withdraw from the public stage into the study."²⁸⁹

Further light is shed on Marx's later distance to his piece on the Historical School of Law by his failure even to announce its inclusion in a projected multi-volume collection of his essays that he began preparing in 1850 and that was to incorporate thirteen other articles from the *Rheinische Zeitung*—including one on the divorce law debate.²⁹⁰ Thus however appropriate it may be for his other contributions to that newspaper, the interpretive injunction not to regard them as mere Hegelianism applied to current events²⁹¹ appears singularly inapplicable to the *Philosophical Manifesto*.

F. Marx's Contribution to the Divorce Law Debate

Although Marx appears never to have occupied himself with Hugo again,²⁹² several months later he contributed to the divorce law

289. Karl Marx, *Zur Kritik der Politischen Ökonomie*, in 2:2 MARX [&] ENGELS, GESAMTAUSGABE (MEGA) 99-100 (1980 [1859]). In describing Marx at the time of his collaboration at the *Rheinische Zeitung*, Treitschke was wrong in asserting that already in 1842 Marx was preparing his transition to communism through "rigorous economic studies." HEINRICH TREITSCHKE, 5 DEUTSCHE GESCHICHTE IM NEUNZEHNTE JAHRHUNDERT 201 (7th ed. 1920).

290. KARL MARX, GESAMMELTE AUFSÄTZE, in 1:10 MARX [&] ENGELS, GESAMTAUSGABE (MEGA) 494-97 (1977 [1851]). "That does not, however, permit the conclusion that only they and no other contributions were planned for the 'Gesammelten Aufsätze' from the 'Rheinischen Zeitung.'" Among the articles of the *Rheinischen Zeitung* that Marx wanted to include, possibly without changes, in the *Gesammelte Aufsätze* was *Der Ehescheidungsgesetzesentwurf*. Id. 1:10 MARX [&] ENGELS, GESAMTAUSGABE (MEGA), *supra* note 99, at 1021-22. Nevertheless, Marx apparently strove for completeness of republication even though his views had changed. See 1:1 MARX [&] ENGELS, GESAMTAUSGABE (MEGA), *supra* note 99, at 978.

291. Heinz Lubasz, *Marx's Initial Problematic: The Problem of Poverty*, 24 POL. STUD. 24, 27 (1976).

292. In the final years of his life, when he was too sick to complete the second and third volumes of *Das Kapital* but well enough to study ancient history, Russian economic works, physics, differential calculus, anthropology, and ethnology, he made a note to himself to "[s]ee Hugo's Naturrecht or similar title (have forgotten it)." THE ETHNOLOGICAL NOTEBOOKS OF KARL MARX *supra* note 284, at 427. On Marx's reading, see MAXIMILIEN RUBEL & MARGARET MANALE, MARX WITHOUT MYTH: A CHRONOLOGICAL STUDY OF HIS

debate. His role in publicizing the secret government proceedings was direct, intentional, and spectacular. On October 20, 1842, five days after becoming editor-in-chief of the *Rheinische Zeitung*,²⁹³ he created a political sensation by publishing the draft. The preamble set forth its clear intention to pave the way for the influence of Christianity to cure the evils of the abuses of the ALR that had weakened the sanctity of marriage and excessively facilitated divorce. Among the grounds for divorce that it eliminated was the *bête noire* of Christian conservatives—mutual agreement.²⁹⁴ Marx himself believed that his obstinacy in refusing to name the person who leaked the draft was the chief reason for the government's ultimately suppressing the newspaper several months later.²⁹⁵

Marx made his first contribution to the divorce law debate in an editorial footnote appended to a two-part article on the subject in November 1842. In that article, a "Rhenish jurist" had argued that the ALR bore testimony to the lax morality prevailing at the end of the eighteenth century; consequently, the divorce law should not be revised so much as destroyed and replaced—but not by one constructed in the spirit of the Historical School, which merely made cuts here and there and added bits and pieces, preparing a passable ragout from anything that was old. Moreover, the author objected to the derogation of judicial power created by conferring on the clergy the sole authority to attempt mandatory reconciliation. Finally, the Rhenish jurist believed that the draft still permitted too many grounds for divorce.²⁹⁶

LIFE AND WORK 312-28 (1976 [1975]).

293. Alice Soon & Eugene Kamenka, *Karl Marx on the Law of Marriage and Divorce*, QUADRANT, June 1969, at 17, 21, erroneously state that Marx became editor on Nov. 14, 1842 and published his editorial footnote on the divorce draft the next morning.

294. *Entwurf einer Verordnung über Ehescheidung, vorgelegt von dem Ministerium für Revision der Gesetze im Juli 1842*, RHEINISCHE ZEITUNG, No. 293, Oct. 20, 1842, Supp., at 1, col. 1.

295. Letter from Marx to Arnold Ruge (Jan. 25, 1843), in 27 MEW, *supra* note 12, at 414 ("if the police nose smells something un-Christian, un-Prussian, the newspaper is not permitted to appear"). The censor during the *Rheinische Zeitung's* last months found it difficult to censor the newspaper because it was so ideological (*Tendenzblatt*) that two-thirds of it should have been stricken, which would have meant that it would not have appeared at all. If, on the other hand, the censorship had been stricter than that of other papers, censorship in general would have been undermined because it was supposed to be just and uniform. During the paper's remaining months the censor's tack included permitting the paper's tendencies to show themselves nakedly so as to alienate the public. The "abstruse and callous dialectic" of articles with a scholarly tone he also passed through because they made the newspaper more hated. Letter of v. Saint Paul to the Councillor Bitter in the Ministry of the Interior (Feb. 9, 1843), in 1 RHEINISCHE BRIEFE UND AKTEN, *supra* note 187, at 428-29.

296. W., *Der Entwurf zum neuen Ehegesetz. Von einem rheinischen Juristen*, RHEINISCHE ZEITUNG, No. 317, Nov. 13, 1842, Supp., at 1, col. 3; RHEINISCHE ZEITUNG,

In his note Marx also commented on an earlier piece in the newspaper—which he characterized as representing “Old-Prussian jurisprudence”—that had speculated on whether the purpose of the draft law was to introduce certain rules derived from religious views that were repulsive to common sense and harmful to the national welfare. Although the author opposed the abolition of judicial authority to grant divorces based on insuperable aversion, he did concur in the draft’s elimination of divorce based on mutual agreement in the case of childless marriages; the latter ground could not, he charged, be justified even from the standpoint of the Protestant conception of marriage.²⁹⁷

In contrast with the viewpoints of Rhenish and Old-Prussian jurisprudence, which were bogged down in debating the individual grounds of divorce, Marx sought to vindicate a general critique from the standpoint of the philosophy of right. In good Hegelian fashion, Marx stressed the primacy of developing the “concept of marriage” and its consequences. Although both articles had rejected the injection of religion into the law, neither had examined whether the “essence of marriage” was in and of itself religious; consequently, neither was able to develop how the consistent legislator would have to act. The essence of marriage was the appropriate starting point because it provided the standard for determining whether the legislator was acting consistently in treating “human *Sittlichkeit*” or “spiritual sacredness” as the essence of marriage; only then would the choice between “loyal submission to the nature of the relationship” or “passive obedience to commands” become clear. If the intention of the religious legislator was to polemicize not against the dissolution of worldly marriage but against the worldly essence of marriage and to purify it of this worldliness, then the critics were deceiving themselves if they believed that they could refute the religious legislator by showing that individual divorce grounds contradicted the worldly essence of marriage.²⁹⁸

No. 319, Nov. 15, 1842, Supp., at 1, col. 1. Although the author conceded that prohibiting divorce on the ground of desertion might seem hard, he added that the husband was still protected against desertion by a right of coercion vis-à-vis his wife, which could be extended if necessary. The ALR did not apply to the Rhine provinces, which were subject to the Napoleonic Code, which still permitted divorce mutually agreed upon by the spouses but otherwise discriminated against wives. See HUBRICH, *supra* note 157, at 209-19; BLASIUS, *supra* note 167, at 34.

297. W., *Bemerkungen über den Entwurf einer Verordnung über Ehescheidung, vorgelegt von dem Ministerium für Revision der Gesetze im Juli 1842*, RHEINISCHE ZEITUNG, No. 310, Nov. 6, 1842, Supp., at 1, col. 3, at 2, col. 2.

298. Karl Marx, *Der Ehescheidungsgesetzentwurf: Kritik der Kritik*, in 1:1 MARX [&] ENGELS, GESAMTAUSGABE (MEGA), *supra* note 6, at 260. As it appeared in the RHEINISCHE ZEITUNG, No. 319, Nov. 15, 1842, Supp., at 2, col. 1, it bore no title; the editorial staff of the newspaper appeared as author. In preparing this article for (aborted)

Marx then criticized Rhenish jurisprudence for not understanding that by dividing marriage into a spiritual and a worldly essence it not only did not abolish the contradiction between the conscience of the individual and the legal consciousness of the citizen, but created one in addition to unresolved collisions between these spheres of life. The religious legislator, in contrast, was at least consistent in elevating what it perceived as religious truth to the only power in the real world; Rhenish jurisprudence merely separated jurisprudence and philosophy. The Old-Prussian jurists, who largely supported the status quo, committed a different mistake: they failed to understand that the ALR was based on an abstraction of understanding (*Verstandesabstraktion*), which was in itself without content but adopted the natural, legal, moral content as external material, which it then tried to arrange according to an external model rather than according to the immanent laws of the objective (*gegenständlich*) world. Not having understood the essence of the ALR, these jurists could not understand the new draft law either; they mistakenly saw bad customs as a proof of bad laws.²⁹⁹

Marx's closing appeal for a self-critical critique was as opaque and oblique as his critique of the ALR, which had an anti-Kantian Hegelian ring to it. It remained to be seen whether the lead article he anonymously published a month later would provide the standards and criteria he found lacking in others' analyses, thus enabling him to offer his own evaluation of the draft law itself rather than mere critiques of critiques. In the same issue that carried that continuation piece, Marx, in an effort to stave off a government ban, reprinted a book review—that Savigny himself had slipped into an official newspaper—that praised the draft law as the most effective support of Christian morality.³⁰⁰

Summarizing the position of the *Rheinische Zeitung*, Marx noted that it agreed with the draft law to the extent that it deemed the ALR *unsittlich*, the number and frivolity of divorce grounds impermissible, and divorce procedures undignified; it objected to the draft because it did not reform the ALR sufficiently, treated marriage as a religious rather than as a *sittlich* institution, and was both too hard and too yielding. While Marx concurred in the opponents' criticism of one of these defects, he could not approve of their "unconditional apology of the earlier system." The reason for his

republication in 1850, Marx corrected one typographical error. 1:1 MARX [&] ENGELS, GESAMTAUSGABE (MEGA), *supra* note 99, at 1052.

299. Marx, 1:1 MARX [&] ENGELS, GESAMTAUSGABE (MEGA), *supra* note 116, at 263. Marx was working with Hegel's explication of *Verstand* as a mode of thought unable to comprehend reality as dialectical. HEGEL, PHÄNOMENOLOGIE, *supra* note 237, at 102-29.

300. *Die preußische Eherechts-Reform*, RHEINISCHE ZEITUNG, No. 353, Dec. 19, 1842, Supp., at 1, col. 2; 1 VON GERLACH, *supra* note 184, at 323.

disagreement was that they focused on the "unhappiness" of spouses whom the new law would bind against their will, forgetting that a divorce also separated families; such an individualistic eudemonian view overlooked the fact that the children and their property could not be divided according to their arbitrary convenience and whims. Marx conceded that if marriage were not the basis of the family, it would be as little subject to legislation as friendship.³⁰¹ But implicitly taking Hegel's viewpoint,³⁰² Marx accused supporters of the ALR of overlooking "the will of the marriage, the sittlich substance of this relationship."³⁰³

In a memorable Hegelianism that presumably endeared Marx to the censors looking over his shoulder, if not to his later self,³⁰⁴ Marx lectured the other disputants that "[t]he legislator . . . does not make laws, he does not invent them, he only formulates them, expresses the internal laws of spiritual relationships in conscious positive laws." Consequently, since the legislator would be acting arbitrarily if it substituted its whims for the essence of the matter, the legislator had the right to regard it as arbitrary when private persons—who were not forced to marry—sought to vindicate their caprices in opposition to that essence. And just as the legislator did not invent marriage, neither did private persons—as little as swimmers did the laws of gravity—who therefore had to obey the law.³⁰⁵

Thus an extravagantly idealistic naiveté vis-à-vis the state went hand in hand with an empty organic communitarianism—"the concept and the essence are bigger than both of us spouses"—and an apparent empirical ignorance of the social conditions that did in fact massively "force" women to marry.³⁰⁶ Such uncharacteristic deficiencies either capture the sort of Marx Marx was in 1842 or suggest the price of deflecting censorship.³⁰⁷

Marx's insistence on obedience to the law made little if any sense in a debate that centered not on resistance to the law but on what the substance of the grounds of divorce should be. And it was

301. On the basis of this argument Marx logically must have opposed eliminating mutual consent as a ground of divorce for childless couples.

302. HEGEL, § 163, *supra* note 151.

303. Marx, in 1:1 MARX [&] ENGELS GESAMTAUSGABE (MEGA), *supra* note 116, at 287-88. Again, this piece bore no title as originally published in the *Rheinische Zeitung*, No. 353, Dec. 19, 1842, at 1, col. 1.

304. A quarter-century later he informed Engels that he was "pleasantly surprised" that there was no reason to be ashamed of their youthful *Holy Family*. Letter from Marx to Engels (Apr. 24, 1867), in 31 MEW, at 290.

305. Marx, 1:1 MARX [&] ENGELS, GESAMTAUSGABE (MEGA), *supra* note 116, at 288.

306. ENGELS, *supra* note 141, at 74-75; MERFELD, *supra* note 75, at 33.

307. In any event, it was absurd for the re-discoverer of Marx's article to claim that it had revealed "all the defects and all the contradictions" of the draft. David Riazanov, *La doctrine communiste du mariage*, in PARTISANS, No. 32/33, at 71, 73 (1966 [1926]).

precisely with regard to the content of the law that Marx failed most woefully. For all his talk about essences, he offered no criteria at all for judging what the essence of marriage might be. He compounded this failing when he finally introduced Hegel formally into the debate as the author of the claim that marriage as a *sittlich* relationship was, qua concept, indissoluble. Although true marriage was thus indissoluble, since no marriage entirely corresponded to its concept, real marriage was dissoluble. Marx faithfully reproduced the contents of § 163 of Hegel's *Philosophie des Rechts*, but proved unable to push the discussion any further than Hegel's platitudes. If anything, he intensified the mystification by means of the following analogy: Just as in nature dissolution (death) appears automatically where an existence ceases to correspond to its determination, and just as world history decides whether a state has become so at variance with the idea of the state that it no longer deserves to exist, so too "the state decides the conditions under which an existing marriage has ceased to be a marriage."³⁰⁸ Marx's attempt to cast the conscious decisionmaking of a monarchy in the same mould as biological processes and the post festum spontaneous results of the interactions of millions of individual and collective events called world history seems, even from a Hegelian vantage point, almost inept.

Yet Marx continued to remain silent on what that "essence" was that would enable the state to issue a death certificate for a marriage.³⁰⁹ In his first and only nod to democracy, Marx added that only if the law was the "conscious expression of the will of the people" could the legislator scientifically measure the existence of a *sittlich* relationship against its essence. In a halfhearted effort at application—the question of whether divorce should be made easier or more difficult—however, Marx reverted to empty Hegelianism, urging the legislator to honor the "profound *sittlich* essence" of marriage by recognizing that it was strong enough to sustain many collisions. By his admonition that "softness vis-à-vis the wishes of the individuals" might easily turn out to be "hardness vis-à-vis the essence of the individuals"³¹⁰ Marx insured that the *Rheinische Zeitung* could not be branded a principled critic of the regressive draft law.³¹¹

308. *Id.* at 288-89.

309. See EUGENE KAMENKA, *THE ETHICAL FOUNDATIONS OF MARXISM* 33 (1962). These winged words of Marx made their way into an East German novel; GÜNTER DE BRUYN, *BURIDANS ESEL* 135 (1987 [1968]).

310. Marx, 1:1 MARX [&] ENGELS, *GESAMTAUSGABE (MEGA)*, *supra* note 116, at 289.

311. As an example of a subsequent principled critique of the draft law from the standpoint of the ALR (that was not subject to the same censorship), see *Über die Reform der preussischen Ehegesetze*, in *DEUTSCHES BÜRGERBUCH FÜR 1845*, at 313 (G. Püttmann ed., 1845).

As with all of Marx's politically explosive contributions to the *Rheinische Zeitung*, it is very difficult to sort out what in Marx's divorce pieces represented his own views and what was merely part of an extended cat-and-mouse game with the political censors³¹² or designed to accommodate potential political supporters. As Marx explained to one of the newspaper's managers in August 1842, an attack on a bedrock institution could easily bring about suppression of the paper. At the same time such articles might alienate "liberal practical men," who had assumed the painstaking role of fighting for freedom within constitutional limits, by "demonstrating their contradictions to them from the comfortable easy chairs of abstraction."³¹³ Amusingly, in an (unsuccessful) effort to persuade the government to rescind its decision to ban the newspaper, Marx was able to emphasize that the *Rheinische Zeitung* had been the only newspaper to defend the main principle of the draft divorce law.³¹⁴ And on Christmas day 1842 Marx included a news item in the *Rheinische Zeitung* that commended the draft law for making the sacredness of marriage the principle of its revision rather than instrumentally judging divorce from the perspective of "the bourgeois legal order or even bourgeois economy": "Marriage was not invented as a civil, private-law institution for the sake of the better ordering of wealth and legal relations. . . . Law is above such external utilitarian considerations."³¹⁵

312. See Friedrich Engels, *Karl Marx*, in 19 MEW 96 (1879). For a humorous account of how Marx once tricked the censor, see GESPRÄCHE MIT MARX UND ENGELS 5-6 (Hans Magnus Enzensberger ed., 1981). On the Prussian state's suppression of the *Rheinische Zeitung*, see GUSTAV MEYER, *Die Anfänge des politischen Radikalismus im vormärzlichen Preußen*, in RADIKALISMUS, SOZIALISMUS UND BÜRGERLICHE DEMOKRATIE 7, 35-52 (Hans-Ulrich Wehler ed., 1969 [1913]).

313. Letter from Marx to Dagobert Oppenheim (Aug. 25, 1842), in 27 MEW, *supra* note 12, at 409-10; see also Letter from Marx to Arnold Ruge (July 9, 1842), in *id.* at 405. While Marx was editor-in-chief, the paper was subject to a second round of censorship by the provincial chief executive. Letter from Marx to Kugelman (Jan. 30, 1868), in 32 MEW, *supra* note 5, at 536 (Marx's curriculum vitae). For a detailed discussion of the massive Prussian censorship, see REINHART KOSELLECK, *PREUSEN ZWISCHEN REFORM UND REVOLUTION: ALLGEMEINES LANDRECHT, VERWALTUNG UND SOZIALE BEWEGUNG VON 1791 BIS 1848*, at 415-34 (1989 [1967]).

314. Karl Marx, *Randglossen zu den Anklagen des Ministerialrescripts*, in 1:1 MARX [&] ENGELS, GESAMTAUSGABE (MEGA), *supra* note 116, at 349, 353 (Feb. 1843). See also letter from Marx to Justus von Schaper (Nov. 12-17, 1842), in 3:1 MARX [&] ENGELS, GESAMTAUSGABE (MEGA), *supra* note 5, at 33; 1 RHEINISCHE BRIEFE UND AKTEN, *supra* note 187, at 338-40. A doctoral dissertation on the *Rheinische Zeitung*, which was published shortly before Marx's authorship of the piece on divorce reform became known, confirmed that the newspaper had dealt with this "ticklish question with high *sittlich* seriousness," without ever stooping, as other liberal papers did, to demagogically exploiting "the lower popular instincts" by calling for a relaxation of marital bonds. KÖNIG, *supra* note 190, at 62.

315. RHEINISCHE ZEITUNG, No. 359, Dec. 25, 1842, at 2, col. 2. Two months later,

Marx's oppositional tactics also included preemptive censorship not only of his own articles but also of those of other contributors. In particular, he was engaged in a running battle with a group of Berlin Young Hegelians (*die Freien*), including Bruno Bauer and Max Stirner, who demanded that he play *va banque* with the newspaper.³¹⁶ Marx, preferring to sacrifice a few "Berlin windbags," refused to permit authors to "smuggle communist and socialist dogmas into casual theater reviews" because it was "unsittlich."³¹⁷ Although Marx continued to combat *die Freien*,³¹⁸ who accused him of opportunism, after a few months he resigned as editor, having grown weary of his own "bowing, scraping, tergiversating, and hair-splitting."³¹⁹

What antagonized *die Freien* was presumably that Marx, by removing the focal point from the legal and practical plane to that of legal philosophy, seemed to dull the current political point. Even if Marx's position is characterized as tactical concealment of his objections to the draft law in the form of mere reservations,³²⁰ such a pragmatic approach alone would undermine the claim that Marx's analysis rose to the level of a programmatic "realistic, namely historical-societally oriented critical theory of law" or that Marx used an "immanent normative analytic procedure" as the basis of his "transcendent social critique of ideology" which unmasked legal

when the newspaper was living on borrowed time, it cast some doubt on the sanctity of marriage in an article mocking the advertisements for marriage partners in a commercial newspaper in Amsterdam, in which "the whole world is offered for sale"—including herring and love. From the blatantly chauvinist advertisements, which commercially reified women, the author speculated that "perhaps Prussia needs instead of a new divorce law a draft law on marital partnership." *Holländische Liebe und Liebeswerbungen*, *RHEINISCHE ZEITUNG*, No. 59, Feb. 28, 1843, at 1, col. 1, 2, col. 3.

316. See generally Mayer, *supra* note 312, at 57-86. Reviewing the role of the *Rheinische Zeitung* five years later, Bruno Bauer charged that in order to thwart the draft law, the newspaper had praised "the existing legal system, which, at the time when the Enlightenment of the preceding century had already lost its hold and had dissolved into reaction by its own weakness, had drawn to its close and viewed marriage from the point of view of its usefulness to the state." The newspaper, in other words, gave up the struggle before it had begun. 1 BRUNO BAUER, *VOLLSTÄNDIGE GESCHICHTE DER PARTHEIKÄMPFE IN DEUTSCHLAND WÄHREND DER JAHRE 1842-1846*, at 94, 96 (1964 [1847]).

317. Letter from Marx to Arnold Ruge (Nov. 30, 1842), in 27 MEW, *supra* note 12, at 411-13. See also Letter from Engels to Franz Mehring (end of April 1895), in 39 MEW, *supra* note 259, at 473.

318. 1:1:1 MEHG, *supra* note 97, at lx-lxi (editorial remarks by Rjazanov). On the settling of accounts, see FRIEDRICH ENGELS & KARL MARX, *DIE HEILIGE FAMILIE*; KARL MARX & FRIEDRICH ENGELS, *DIE DEUTSCHE IDEOLOGIE*, in 3 MEW 176-221 (1958 [1845-46]).

319. Letter from Marx to Arnold Ruge (Jan. 25, 1843), 27 MEW, *supra* note 12, at 415.

320. 1:1:1 MEHG, *supra* note 97, at lxi (editorial comments by Rjazanov). Rjazanov, however, exaggerated by characterizing Marx's article as a "fundamental critique."

practice as the "false consciousness . . . of false societal relations."³²¹

Marx's concern for the consequences of divorce on children³²² may in part account for his insistence on mobilizing the state to deal with social problems. Although Marx, like Savigny, apparently advocated limiting spouses' discretion to divorce each other, unlike Savigny, he derived this obligation from the worldly essence of marriage rather than from its character as a supra-individual institution. In this sense his defense of marriage as a worldly institution may have been motivated by his view at that time of marriage as an necessary element of a survival strategy for the underclasses during industrialization when the right to settlement and thus to participate in poor-law relief programs depended on married status.³²³ This speculation is, to be sure, undercut by the fact that the otherworldly character of Marx's discussion of marriage as a worldly institution strongly suggests that he had not yet reflected on the economic structures that forced women into marriage. Moreover, the fact that the "devout . . . Marxist,"³²⁴ August Bebel, as the leader of German Social Democrats' (unsuccessful) opposition to the repeal of the ALR divorce provisions at the end of the century, took the position that it was *unsittlich* to expose children to constantly warring parents,³²⁵ suggests that Marx did not long espouse the view he appears to have presented in 1842.³²⁶

That Marx's understanding of society soon underwent rapid change is obvious from the fact that in 1842 he still accepted an individualistic socioeconomic order in which the family was assigned important tasks of social reproduction that, according to Marx's later views, would be communalized in a post-capitalist society; there relationships that had taken the form of marriage would cease to be the objects of legislation.³²⁷ The pitiless denunciations that Marx (and Engels) soon fired at the prostitution of women in mar-

321. Paul, *supra* note 279, at 80-83. Paul appears to have arrived at this conclusion by conflating the divorce law draft with the other legislation that Marx criticized in 1842 in other articles.

322. Marx shared this concern with the leading pandectist supporter of the draft, who, to be sure, expressed it ironically; Puchta, *supra* note 187, at 11-12.

323. See BLASIUS, *supra* note 167, at 62-64.

324. GORDON CRAIG, GERMANY 1866-1945, at 266 (1980 [1978]).

325. 4 STENOGRAPHISCHE BERICHTE ÜBER DIE VERHANDLUNGEN DES REICHSTAGS, IX. LEGISLATURPERIODE, IV. SESSION 1895/97, at 2939D-2940A.

326. But Christopher Lasch has a century and a half later advocated making a constitutional amendment of it by prohibiting all couples with children under twenty-one from divorcing. *Who Owes What to Whom?*, HARPER'S, Feb. 1991, at 43, 48 (discussion contribution by Lasch).

327. See Friedrich Engels, *Grundsätze des Kommunismus*, in 4 MEW 363, 377 (1959 [1847]) (precursor of *Communist Manifesto*); Thilo Ramm, *Die künftige Gesellschaftsordnung nach der Theorie von Marx und Engels*, in 2 MARXISMUSSTUDIEN 77, 98 (1957).

riage and the family—"[t]he bourgeois sees in his wife a mere instrument of production"—in the *Economic-Philosophical Manuscripts* and the *Communist Manifesto* underscored the scope and depth of the transformation of his altered world view.³²⁸

G. Marx as Forerunner of Lola-Lola?

*Ich kann Ihnen ohne alle Romantik versichern, daß ich von Kopf bis zu Fuß und zwar allen Ernstes liebe.*³²⁹

—Karl Marx

*Ich bin von Kopf bis Fuß auf Liebe eingestellt, Das ist meine Welt und sonst gar nichts.*³³⁰

—Marlene Dietrich

In sharp contrast to his contemporaneous pieces in the *Rheinische Zeitung* on socioeconomic issues, Marx's intervention into the debate on divorce demonstrably failed to adhere to his own methodological guideline of the time as he articulated it to one of the newspaper's managers: "The true theory must be made clear and developed within concrete conditions and with regard to existing relations."³³¹ Although the future Marx was only embryonically visible even in the former writings, the development of his understanding of poverty hinged in no crucial way on a mechanical application of Hegel's *Philosophy of Right*; Marx was able to see the empirical world in ways that would have been inaccessible to someone confined to Hegelian categories.³³²

328. KARL MARX & FRIEDRICH ENGELS, MANIFEST DER KOMMUNISTISCHEN PARTEI, in 4 MEW at 459, 478-79 (1848); MARX, *supra* note 20, at 534-35. Later Engels advocated divorce as a blessing especially if people were spared having to "wade through the the useless dirt of divorce proceedings." ENGELS, *supra* note 141, at 83.

329. "I can assure you without any romanticism that I love from head to foot and indeed in all seriousness." Letter from Marx to Arnold Ruge (Mar. 13, 1843), in 27 MEW, *supra* note 12, at 417 (shortly before his marriage to Jenny von Westphalen).

330. "From head to foot I'm attuned to love, That's my world, and otherwise nothing at all." THE BLUE ANGEL: A FILM BY JOSEF VON STERNBERG 77 (1968 [1930]).

331. Letter from Marx to Dagobert Oppenheim (Aug. 25, 1842), in 27 MEW, *supra* note 12, at 409. Thus it was not the case that in all of his articles "Marx treated current questions of the day as concrete phenomenal forms of general problems." D. ROSENBERG, DIE ENTWICKLUNG DER ÖKONOMISCHEN LEHRE VON MARX UND ENGELS IN DEN VIERZIGER JAHREN DES 19. JAHRHUNDERTS 40 (Wilhelm Fickenscher trans., 1958). Lukács, too, exaggerated the forward-looking aspects of Marx's divorce article. GEORG LUKÁCS, *Zur philosophischen Entwicklung des jungen Marx, 1840-1844*, in SCHRIFTEN ZUR IDEOLOGIE UND POLITIK 506, 524, 526 (1967 [1954]).

332. For Marx's anonymous articles from the *Rheinische Zeitung*, see *Die Verhandlungen des 6. Rheinischen Landtags, Erster Artikel: Debatten über Pressefreiheit*

In contrast, the Marx-to-be was nowhere to be found in the divorce pieces, which not only were devoid of empirical investigation, but also slavishly followed Hegel. In particular, whereas Marx adumbrated a class-based framework for understanding legislation and state administration regarding the poor, his approach to the state in its regulation of family life was uncritical—except for his materialist analysis of the role of religion. Here he showed the way to the other contributors to the newspaper by demanding that they criticize religion in their critiques of political affairs (rather than the other way round) because religion, as the theory of an inverted reality, would collapse on its own with the dissolution of that reality.³³³

Marx's breakthroughs to independence of thought regarding the so-called social question on the one hand and the family on the other seem, then, to have been asynchronous. By the same token, his detached, quasi-academic, and indecisive commentary on marriage deviated so conspicuously from the aggressively oppositional and sovereignly contemptuous tone for the powers that be that marked Marx as a dissident in matters touching on poverty and censorship³³⁴ that it raises the possibility that Marx had reason to believe that the king—whose personal involvement in the reform led him to regard press criticism as a personal attack—and the Prussian government, especially after his disclosure of the draft law, would tolerate no further insubordination in this area.³³⁵ It was therefore no wonder that a half-century later, when the dying Engels sought to rescue from anonymity, oblivion, and the public domain "the main things from Marx's presocialist period," he fastened on the articles on the wood theft law, the condition of wine peasants, and freedom of the press, apparently forgetting even the existence of those on divorce and Hugo.³³⁶

Ironically, then, despite her misconceived critique of Marx's

und Publikation der Landständischen Verhandlungen; Verhandlungen des 6. Rheinischen Landtags, Dritter Artikel: Debatten über das Holzdiebstahls-gesetz, in id. at 199 (Oct. 25-Nov. 2, 1842); *Rechtfertigung des 17-Korrespondenten von der Mosel, in id.* at 296 (Jan. 15-20, 1843). For an excellent discussion of Marx's articles on the social question, see Lubasz, *supra* note 291, at 28-34.

333. Letter from Marx to Ruge (Nov. 30, 1842), in 27 MEW, *supra* note 12, at 412.

334. See Marx, *Die Verhandlungen des 6. Rheinischen Landtags, Erster Artikel: Debatten über Pressfreiheit und Publikation der Landständischen Verhandlungen*.

335. See KÖNIG, *supra* note 190, at 63.

336. Letters from Engels to Richard Fischer (Apr. 5, 15, & 18, 1895), in 39 MEW, *supra* note 259, at 459, 466, 471; Letter from Engels to Franz Mehring (end of April, May 9, 1895), *id.* at 474, 476. In the biography of Marx that Engels wrote for the *Handwörterbuch der Staatswissenschaften* he did not include these pieces in what he termed "the most complete possible list" of Marx's published writings. Friedrich Engels, *Heinrich Karl Marx*, in 22 MEW 337, 342 (1963 [1892]). It is unclear whether Engels had ever been aware of Marx's authorship of the articles in question.

analysis of female workers, MacKinnon may have unwittingly put her finger on a diremption between Marx's analysis of political economy and love. In one of his relatively few letters to his wife written later in life (while she was in Germany in 1856), Marx self-mockingly portrayed their emotional relationship as a sanctuary from societal relations (despite the fact that the Marx household was an eminently political and public one).³³⁷

Bad as your portrait is, it performs the best services for me, and I now understand how even "the Black Madonnas," the most reviled portraits of the mother of God, could find their imperturbable admirers, and even more admirers than the good portraits. In any case, none of these Black Madonna pictures has ever been more kissed and ogled and adored than your picture, which to be sure is not black but cross, and in no way reflects your dear, sweet, kissable, "dolce" face. [I] kiss you from head to foot, and I fall before you on my knees and moan: "Madame, I love you." And indeed I do love you, more than the Moor of Venice ever loved. . . . Who of my many slanderers and adder-tongued enemies has ever reproached me with feeling a vocation to play the lover's role in a second-rate theater? And yet it is true. Had the scoundrels possessed the wit, they would have painted "the relations of production and of commerce" on the one side and me at your feet on the other. Look to this picture and that—they would have written underneath. But stupid scoundrels they are and stupid they will remain, in seculum seculorum. . . . I feel like a man again because I feel a great passion, and the manifoldness in which study and modern education entangle us, and the skepticism with which we necessarily carp at all subjective and objective impressions are calculated to make us all small and weak and whining and undecided. But love, not for Feuerbachian Man, not for Moleschottian metabolism, not for the proletariat, but rather love for the sweetheart and in particular for you makes the man into a man again.³³⁸

337. See MONZ, *supra* note 21, at 361 (after the revolution of 1848 many refugees congregated in Marx's house).

338. The passage reads in the original:

Schlecht, wie Dein Porträt ist, leistet es mir die besten Dienste, und ich begreife jetzt, wie selbst "die schwarzen Madonnas", die schimpfiertesten Porträts der Mutter Gottes, unverwüsthche Verherer finden konnten, und selbst mehr Verehrer als die guten Porträts. Jedenfalls ist keines dieser schwarzen Madonnabilder je mehr geküßt und angeäugelt und adoriert worden als Dein Photograph, das zwar nicht schwarz ist, aber sauer, und durchaus Dein liebes, süßes, küßliches, "dolce" Gesicht nicht widerspiegelt. [I]ch küsse Dich von Kopf bis Fuß, und ich falle vor Dir auf die Knie, und ich stöhne: "Madame, ich liebe Sie." Und ich liebe Sie in der Tat, mehr als der Mohr von Venedig je geliebt hat. . . . Wer von meinen vielen Verleumdern und schlangenzüngigen Feinden hat mir je vorgeworfen, daß ich berufen sei, eine erste Liebhaberrolle auf einem Theater zweiter Klasse zu spielen? Und doch ist es wahr. Hätten die Schufte Witz besessen, sie hätten "die Produktions- und Verkehrrsverhältnisse" auf die eine Seite gemalt und mich zu Deinen Füßen auf der andern. Look to this pic-

These emotions³³⁹—stripped of the mature Marx's irony—are of a piece with the voluminous lyric love poetry that, as an eighteen-year-old, he had composed for Jenny von Westphalen two decades earlier³⁴⁰ as well as with the exuberantly passionate love letters from her to him from the same period and even later.³⁴¹ They also prefigure the “demonstrative pathos” of the dying widower, contemplating the harbor of Algiers and the outlying snow-topped mountains from his hotel room, whose thought was “to great part absorbed by reminiscence of my wife, such a part of my best part of life!”³⁴²

ture and to that—hätten sie darunter geschrieben. Aber dumme Schufte sind es und dumm werden sie bleiben, in seculum seculorum. . . . Ich fühle mich wieder als Mann, weil ich eine große Leidenschaft fühle, und die Mannigfaltigkeit, worin uns das Studium und moderne Bildung verwickeln, und der Skeptizismus, mit dem wir notwendig alle subjektiven und objektiven Eindrücke bemängeln, sind ganz dazu gemacht, uns alle klein und schwach und quängelnd und unentschieden zu machen. Aber die Liebe, nicht zum Feuerbachschen Menschen, nicht zum Moleschottischen Stoffwechsel, nicht zum Proletariat, sondern die Liebe zum Liebchen und namentlich zu Dir, macht den Mann wieder zum Mann.

Letter from Karl Marx to Jenny Marx (June 21, 1856), in 3:8 KARL MARX [&] FRIEDRICH ENGELS, GESAMTAUSGABE (MEGA), *supra* note 2, at 30-31 (1990).

339. KÜNZLI, *supra* note 4, at 337, in yet another wilful interpretation, sees the letter as one that could have been written only by “a youth at the end of his years of puberty . . . who in the daily life of his marriage does not really live his feelings, his love.”

340. 1:1 MARX [&] ENGELS, GESAMTAUSGABE (MEGA), *supra* note 116, at 477-612 (1836). Among Marx's poems, see, e.g., *An Jenny: Sonnette*: “Sieh! ich könnte tausend Bücher füllen, und nur ‘Jenny’ schrieb ich stets hinein.” *Id.* at 607. See generally William Johnston, *Karl Marx's Verse of 1836-1837 as Foreshadowing of his Early Philosophy*, 28 J. HIST. IDEAS 259 (1967).

341. Letters from Jenny von Westphalen to Karl Marx (May 10, 1838, June 24, 1838, ca. 1839-40, Mar. 24, 1846), in 3:1 MARX [&] ENGELS, GESAMTAUSGABE, *supra* note 5, at 331, 332, 337, 517; (Aug. 10, 1841), in MEW Supp. pt. 1, *supra* note 20, at 641.

342. Letter from Marx to Engels (Mar. 1, 1882), in 35 MEW, *supra* note 13, at 46 (quotation written by Marx in English). Marx himself was aware that he had begun losing his grip on grammar and syntax; Letter from Marx to Engels (Mar. 28-31, 1882). *Id.* at 51.